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WISCONSIN REPORTS

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CASES DETERMINED

IN THE

SUPREME COURT

OF

WISCONSIN

JANUARY 31 — APRIL 5, 1911.

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OF THE

SUPREME COURT OF WISCONSIN

DURING THE PERIOD COMPRISED IN THIS VOLUME

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SUPREME COURT RULE 63.

Adopted May 2, 1911.

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MEMORANDUM.

Mr. Justice SIEBECKER took no part in the decision of the cases reported in this volume on pages 450 to 638 inclusive.

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CASES DETERMINED

AT THE

January Term, 1911.

Loos, Respondent, vs. Geo. Walter Brewing Company, Appellant.

January 11—January 31, 1911.

Master and servant: Requiring additional services: Discharge: Breach of duty: Questions for jury.

1. **As long as he is permitted to perform the services he contracted for, a servant cannot treat a mere request or direction to perform additional services as a discharge; but he may so treat a refusal to permit him to perform the substantial or principal service he agreed to perform and a direction to substitute a different service.**
2. **An employee of a brewing company having been sent to assist in the purchase of a saloon by a prospective customer of the company to whom the company was to loan the money to carry out the deal, the question whether, in accepting a commission from the vendor, such employee was guilty of such a breach of duty as to warrant his discharge is *held*, upon the evidence, to have been one for the jury, it being doubtful whether any wrong was intended or any real injury inflicted upon the employer's business.**
3. **If misconduct amounting to breach of the contract of employment existed at the time of a discharge, the employer can justify under it even though he did not know of it at the time.**

Appeal from a judgment of the circuit court for Winnebago county: Geo. W. Burnell, Circuit Judge. *Affirmed.*

Action to recover damages for alleged wrongful discharge from employment under a written contract entered into Feb-

ruary 6, 1904, whereby it was agreed that plaintiff should render services to the defendant from March 1, 1904, to March 1, 1909, as salesman of its beer and beer products and as collector of its accounts and demands arising from sales of beer and beer products, and at times not so occupied it should be his duty in a general way to serve and assist in and about said business, according to his ability, and to observe and obey all proper directions that might from time to time be given him by the general manager or other authorized business representative of the defendant, for an annual salary of $1,200 payable in equal instalments at the end of each month. Plaintiff entered upon his employment at the stipulated time and remained therein until about April 16, 1906, when he claims he was discharged. Defendant denies that he was discharged, and alleges that, if he was, there was sufficient excuse therefor growing out of plaintiff's misconduct.

The jury by a special verdict found (1) that plaintiff was discharged from his principal employment; (2) that defendant was not justified in discharging him; (3) that plaintiff duly performed all the conditions of his contract while in the employ of the defendant; (4) that plaintiff did not cause any dissatisfaction among customers of the defendant with an intent to injure its business; (5) that plaintiff did not misrepresent defendant's business and management in a manner which tended to injure its business; (6) that plaintiff's conduct in the Hemple-Schmitz deal was not a breach of duty; and (7) that plaintiff was entitled to recover $1,681 with interest from July 29, 1909. From a judgment upon the special verdict entered in favor of the plaintiff the defendant appealed.

For the appellant there was a brief signed by *J. Elmer Lehr* and *Albert Krugmeier,* attorneys, and *H. C. Sloan,* of counsel, and oral argument by *Mr. Lehr* and *Mr. Krugmeier.*

For the respondent there was a brief by *H. D. Ryan* and *A. M. Spencer,* and oral argument by *Mr. Spencer.*

VINJE, J. The assignments of error reduce themselves to two questions: Was the plaintiff discharged? and If so, was the defendant justified in discharging him? It is not claimed by either party that there was a discharge from all employment under the contract; but the plaintiff claims that his principal employment was that of a salesman and collector, and that on or about the 16th day of April, 1906, he was required by the defendant to take permanent charge of its bottling department, and that such a requirement was equivalent to a discharge. The defendant admits it required plaintiff to take charge of its bottling department, but maintains that he was asked to do so only temporarily while an investigation could be made relative to the alleged dissatisfaction of some of its customers claimed to have been caused by the plaintiff. Upon the issue as to whether or not such change in employment was to be permanent or only temporary there was a sharp conflict of testimony, and the finding of the jury in favor of the plaintiff cannot be disturbed as against the clear preponderance thereof or as not supported by credible evidence. Undoubtedly the plaintiff, under the provisions of the contract set out in the statement of facts, could be required to perform temporary services in the bottling department, and a request so to do would not constitute a breach of the contract of employment. He agreed to perform such or any other reasonable service at times when he was not occupied in his principal employment, namely, that of a salesman and collector. It has been held that a request to perform an additional service of the same kind is not a discharge. *Koplitz v. Powell,* 56 Wis. 671, 14 N. W. 831. (As long as the servant is permitted to perform the services he contracts for, he cannot treat a mere request or direction to perform additional services as a discharge. Neither would a master be justified in discharging a servant for a refusal to perform services outside the scope of his employment. *Koplitz v. Powell, supra.* But when there is a

refusal to permit the servant to perform the substantial or principal service he agreed to perform and a direction to substitute a different service, as in this case, then the servant may treat such refusal and direction as a discharge. *Cooper v. Stronge & Warner Co.* 111 Minn. 177, 126 N. W. 541; *Marx v. Miller,* 134 Ala. 347, 32 South. 765; *Roserie v. Kiralfy Bros.* 12 Phila. 209; *Warner v. Rector, etc.* 1 City Ct. R. 419; *Pepper v. Kisch,* 2 City Ct. R. 131. This is upon the principle that both parties are entitled to a substantial compliance with the contract, and that he who refuses to permit it is guilty of a breach thereof. The trial court, therefore, under the findings of the jury, properly held plaintiff was discharged. Even after a discharge the servant is under no obligation to enter upon a different employment in order to relieve his employer as much as possible from the loss consequent upon the breach of his contract. *Fuchs v. Koerner,* 107 N. Y. 529, 14 N. E. 445; Wood, Mast. & Serv. (2d ed.) sec. 127.

It remains to consider whether or not the defendant was justified in discharging plaintiff. The ground upon which justification was urged in this court was his conduct in the so-called Hemple deal. It appears that before plaintiff entered the employ of the defendant and while he was in the employ of another brewing company, Mrs. Hemple, who owned a saloon, told him that she would give him $200 if he would find her a purchaser for her saloon property. A Mr. Schmitz became a prospective purchaser, and he requested the defendant, who was to loan him some money to carry out the deal, to send some one to assist him. The defendant sent the plaintiff, because he was good at taking inventories, quick at figures, and able to draw the required papers. The deal was closed at $5,000, the price Mrs. Hemple put upon the property, and plaintiff received from her a commission of either $100 or $200. He says it was only $100, but she says it was $200. The defendant made a loan of $4,500 to

Schmitz on the property, and afterwards took it in payment of the loan, as Schmitz was unable to make the stipulated payments when they became due. Later the defendant sold the property, but at what price does not appear. Defendant claims this conduct on the part of plaintiff in accepting a commission from Mrs. Hemple warranted his discharge. This court has said:

"It is not for every breach of duty that an employer is warranted in putting an end to a contract of employment before the appointed time. In a controversy over such a matter, especially where the employment is of a business nature, requiring the exercise of judgment and discretion, the breach of duty is not *per se* a legal justification for a discharge of the employee, unless such breach evidences moral turpitude, or the conduct is manifestly injurious to the employer's business. So, where the question of the breach itself is undisputed, but the evidence leaves it in doubt as to whether there was any wrong intended, or any real injury inflicted, upon the employer's business, whether it constituted reasonable ground to discharge the employee is always a fact to be found by the jury." *Schumaker v. Heinemann,* 99 Wis. 251, 255, 74 N. W. 785.

We cannot say in this case as a matter of law that the fact that plaintiff received a commission from Mrs. Hemple in the sale of her property to Mr. Schmitz evinced moral turpitude on his part or was manifestly injurious to defendant's business. No pecuniary damage is shown. It was contemplated that Mr. Schmitz should become a customer of the defendant, and the evidence shows that he continued to be so as long as he carried on the business. After he quit, the subsequent purchasers bought only part of their beer from defendant, but the jury was undoubtedly warranted in finding that such fact was not the result of the commission received by the plaintiff. We do not desire to be understood as commending the action of plaintiff. Indeed, it comes close to the border line of a serious breach of duty. For that reason it was properly left to the jury to say whether or not any wrong was intended or

any real injury inflicted upon the master's business. They found there was not, and we cannot say such finding was erroneous.

It appears that at the time defendant directed plaintiff to take charge of the bottling department it had no knowledge of the fact that he had received a commission from Mrs. Hemple. Such knowledge, however, was not necessary in order to entitle it to justify the discharge on account of the alleged misconduct. If misconduct amounting to a breach of contract exists at the time of a discharge the master can justify under it irrespective of whether or not he knew it at the time of the discharge. *Von Heyne v. Tompkins,* 89 Minn. 77, 93 N. W. 901; Wood, Mast. & Serv. (2d ed.) sec. 121. We find no error in the record.

By the Court.—Judgment affirmed.

STARK, Appellant, vs. HUBER MANUFACTURING COMPANY, Respondent.

January 11—January 31, 1911.

Principal and agent: Notes taken by agent as his own property: Evidence.

Findings of the trial court that certain notes given by the purchasers of machinery were accepted by the agent making the sale as his own property and were so treated by him from the time of their execution, and hence that he did not purchase them from his principal, are *held* to be sustained by the evidence, although the notes were executed upon printed forms naming the principal as payee and were afterwards indorsed by the principal "without recourse."

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

The defendant is a corporation incorporated under the laws

of the state of Ohio and manufactures boilers, steam engines, and agricultural implements. The plaintiff was the local agent of the defendant at Fond du Lac, Wisconsin.

The plaintiff as agent of the defendant had negotiations with one Fredericks for furnishing Fredericks with an outfit of machines furnished by the defendant. When delivered to the plaintiff it was found that the outfit was not in all respects what Fredericks had desired and ordered and in consequence it was refused by him. The plaintiff then retained possession of the outfit for the purpose of disposing of it and thereafter entered into negotiations with one Bailey and others with a view to having them take the outfit, and finally on July 17, 1902, made arrangements with Bailey and his partners to take the outfit for $1,874. On this deal the plaintiff's commission would be about $200. Notes and a chattel mortgage upon the outfit, executed by Bailey and his partners in favor of the defendant, were received and recorded by the plaintiff. The defendant was unwilling to take the paper and security of the purchasers in settlement of the indebtedness, and an arrangement was made on July 25, 1902, between the plaintiff and the traveling agent of the defendant whereby the plaintiff was to execute his note, due January 1, 1903, in favor of the defendant for $1,675, the net sum defendant was to receive for the outfit, and was to receive the notes and other security executed by Bailey and his partners on blanks of the defendant and running in its name. The plaintiff paid his note for $1,675 in favor of the defendant when it became due and duly received the notes of William Bailey and his partners, indorsed "without recourse," and the chattel mortgage. The plaintiff, believing that the notes and chattel mortgage made in the name of the defendant were void under the provisions of sec. 1770*b*, Stats. (1898), because the defendant had not filed a copy of its articles of incorporation with the secretary of state, arranged with Bailey and his new partner for the execution on April 18, 1904, of a new chattel mortgage and

notes to cover the indebtedness due for the outfit sold to Bailey and his partners. These were delivered to and retained by the plaintiff. An execution on a judgment in favor of the Northern Thresher Company was levied upon the interest of William Bailey in the outfit sold to Bailey and his partners, and the plaintiff, believing that the lien thus created was prior to his new chattel mortgage, paid $571.75 and satisfied this claim to protect his chattel mortgage claim on the property.

Plaintiff brings this action to recover the amount thus paid by him in satisfaction of the claim under the levy mentioned above, alleging that he had purchased the notes and mortgage executed by Bailey and his partners from the defendant and that he had paid the lien for $571.75 in good faith to protect the defendant and to minimize the damages he would have against the defendant.

The court found that the plaintiff had sold the outfit to Bailey and his partners on his own account and that the defendant was not the vendor of the outfit to Bailey and his partners, but that they bought it directly from the plaintiff, who took notes for the purchase price on blanks running to the defendant but for himself, and that the transaction was regarded and treated by both the plaintiff and the defendant as a sale of the outfit by the plaintiff.

This is an appeal from the judgment of the trial court dismissing the complaint and awarding costs to the defendant.

The cause was submitted for the appellant on the briefs of *Gerrit T. Thorn,* attorney, and *Charles H. Forward,* of counsel, and for the respondent on the brief of *R. L. Morse.*

SIEBECKER, J. The only issue raised in this action is one of fact pertaining to the purchase of the Bailey notes by the plaintiff from the defendant. The trial court found that the plaintiff was acting as defendant's agent in the season of 1902; that the plaintiff accepted and treated these notes of the purchasers of the threshing outfit as his own from the time

of their execution; that it was understood between the plaintiff and the defendant that the plaintiff received them as his own property, and that he therefore gave his personal note for the amount due the defendant for the property so sold by the plaintiff; and that under the circumstances shown the defendant was not the owner of the notes in question, and hence that the plaintiff did not purchase them from the defendant. We have examined the evidence and are persuaded that the court's conclusions of fact are supported thereby. It appears that the defendant's representative at no time accepted these notes as payment for the threshing outfit, nor were they so received for the defendant by the plaintiff as its agent. The defendant's agent persistently maintained that the plaintiff, in dealing with the purchasers of this outfit, accepted their notes as his property and at no time accepted them for the defendant. This is corroborated by plaintiff's conduct and express declaration.

The fact that the notes were executed on printed forms in the name of the defendant is not conclusive of the fact that they were not the plaintiff's property under the circumstances attending their execution. Such form of the notes does not render it impossible that the plaintiff accepted them as his property and relied on the expectation that the defendant would formally indorse them so as to make the written evidence of his title complete. Under this state of the evidence we cannot hold that the findings of the trial court are against the clear preponderance of the evidence, and they must stand.

By the Court.—Judgment affirmed.

REEVES & COMPANY, Appellant, vs. SAXTON and another, Respondents.

January 11—January 31, 1911.

Homestead: Exemption from execution: What occupancy gives right.

Mere occupation of premises with permission of the life tenant by one having only a remainder or reversion after the termination of the life estate, does not entitle the occupant to claim the premises as his homestead, exempt from execution under sec. 2983, Stats. (Supp. 1906: Laws of 1901, ch. 269, sec. 1). Although by said statute the exemption extends "to any estate less than a fee held by any person by lease, contract or otherwise," there must be a present right of occupancy by title in the person claiming the homestead.

APPEAL from an order of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Reversed.*

This is an appeal from an order enjoining the sale of the property described in the complaint on the ground that it was the homestead of the defendant *Erastus Wilber Saxton.* The property belonged to Catherine Saxton, mother of *Erastus Wilber Saxton,* and in the year 1905 she deeded it to her son *Erastus Wilber Saxton,* but reserved "the use and occupancy during her natural life." At the time this action was commenced said *Erastus* was occupying said property as his homestead with the consent and approval of his mother, which said property does not exceed in value $5,000 and does not exceed in extent more than a quarter of an acre, and is located within the corporate limits of the city of Appleton, Wisconsin. Judgment was obtained against the defendants and an execution issued, and the proceeding resulting in the injunctional order made grew out of the claim of defendant *Erastus Wilber Saxton.*

For the appellant there was a brief by *Gerrit T. Thorn,* and oral argument by *Mr. Thorn* and *Mr. Charles H. Forward.*

For the respondent *Saxton* there was a brief by *A. M. Spencer* and *Henry D. Ryan,* and oral argument by *Mr. Spencer.*

KERWIN, J. The court is of opinion that this case is ruled by *Cornish v. Frees,* 74 Wis. 490, 43 N. W. 507. It is considered that there must be a present right of occupancy by title in the person claiming the homestead, and that in the present case the right of occupancy and title is in Catherine Saxton, mother of defendant *Erastus Wilber Saxton,* and the defendant *Erastus Wilber Saxton,* having only a remainder or reversion after the termination of the life estate, has no present right of occupancy sufficient to carry with it the privileges of homestead rights during the life estate in his mother, even though permitted to live with her on the premises. Appellant relies upon the following authorities: Tiedeman, Real Prop. § 212; 21 Cyc. 503; *Cornish v. Frees,* 74 Wis. 490, 43 N. W. 507; *Brokaw v. Ogle,* 170 Ill. 115, 48 N. E. 394; *Murchison v. Plyler,* 87 N. C. 79; *Merrifield v. Merrifield's Assignee,* 82 Ky. 527; *In re Sale,* 143 Fed. 310; *Hampton v. Gilliland,* 23 Tex. Civ. App. 87, 56 S. W. 572; *Roach v. Dance,* 26 Ky. Law Rep. 157, 80 S. W. 1097.

The respondent relies upon sec. 2983, Stats. (1898), as amended (Supp. 1906: Laws of 1901, ch. 269, sec. 1), and especially upon the following portion:

"Such exemption shall extend to land not exceeding altogether the amount and value aforesaid, owned by a husband and wife jointly or in common and to the interest therein of a tenant in common or two or more tenants in common, having a homestead thereon, with the consent, expressed or implied, of the cotenants, and to any estate less than a fee held by any person by lease, contract or otherwise."

Also sec. 2984*a,* Stats. (Supp. 1906: Laws of 1901, ch. 269, sec. 3), which reads:

"Wherever the word homestead is used in the statutes of 1898 or in any law of this state or in this act, it shall be defined to be the estate or interest in land as defined and set forth in sec. 1 of this act."

Stress is specially placed on the language of the statute, "to any estate less than a fee held by any person by lease, contract

or otherwise," and it is contended that the occupancy by the defendant *Erastus Wilber Saxton* through his mother brought him within the language and spirit of the statute under the liberal rule in favor of homestead rights. Respondents rely on the provisions of the statutes before cited and the following authorities: *In re Kaufmann,* 142 Fed. 898; 1 Washb. Real Prop. (3d ed.) 562; *Elsner v. Dorn,* 136 Wis. 73, 116 N. W. 768; *Bartle v. Bartle,* 132 Wis. 392, 112 N. W. 471; *Murphy v. Crouch,* 24 Wis. 365. In addition to the authorities cited by counsel we have examined several others, notably *Bartholomew v. West,* 2 Dill. 290, 2 Fed. Cas. 963; *Lozo v. Sutherland,* 38 Mich. 168; *In re Swearinger,* 5 Sawy. 52, 23 Fed. Cas. 527; *Wright v. Bond,* 127 N. C. 39, 37 S. E. 65; *Hampton v. Gilliland,* 23 Tex. Civ. App. 87, 80 S. W. 1097; *Davis v. Brown* (Tenn. Ch. App.) 62 S. W. 381; *Roach v. Dance,* 26 Ky. Law Rep. 157, 80 S. W. 1097. Decisions from other states, however, are not very helpful, since they are based upon statutes quite different from ours.

The question is not free from difficulty, especially in view of the changes made in our statutes on the subject since the decision in this court in *West v. Ward,* 26 Wis. 579; but the court is of opinion that the defendant *Erastus Wilber Saxton* had no homestead rights in the premises, therefore the order must be reversed.

By the Court.—The order appealed from is reversed.

City of Manitowoc, Appellant, vs. Manitowoc & Northern Traction Company, Respondent.

January 12—January 31, 1911.

Constitutional law: Remedies: Condition of judgment: Injunction: Carriers: Fixing rates: Interurban railways: Use of streets: Power of city: Contract as to rates: Subsequent changes: Legislative power to alter franchises: Railroad commission: Statutes construed: Power of courts.

1. Where after trial on the merits a circuit court decides that a plaintiff is entitled to a permanent injunction as prayed, it is error to make the granting of such relief conditional upon the filing of an undertaking that if on appeal judgment shall be awarded to defendant plaintiff will pay such damages as defendant shall have sustained by reason of the injunction. Such a requirement violates sec. 9, art. I, Const.
2. Until the state sees fit to interpose, a carrier may ordinarily exercise a free hand in fixing rates, subject to the qualification that such rates must not be unreasonably high nor unjustly discriminatory, and may enter into a binding contract on the subject with the municipality from which it receives a franchise.
3. Under sec. 1863, Stats. (Supp. 1906: Laws of 1901, ch. 425), a city may, if it sees fit, refuse to grant to an interurban railway company the right to run its cars over the city streets. Having such power, it may, on granting the right, exact any conditions it sees fit, provided they are not unlawful in themselves, such as an agreement that the rate of fare to a neighboring city shall not exceed a certain sum.
4. Sec. 1862, Stats. (1898), and sec. 1863, Stats. (Supp. 1906: Laws of 1901, ch. 425), are not analogous to sec. 1778, Stats. (1898), under which it has been held that, since telephone and telegraph companies not only receive their franchises directly from the state but are expressly authorized by the state to use the public streets and highways, the authority of local municipalities is restricted to legitimate police regulation.
5. Where, in the exercise of a power specifically conferred upon it, a city passes an ordinance granting to a street or interurban railway company a franchise, and fixing rates, it acts as the agent of the state, and when, by acceptance, the ordinance becomes a contract the public is concluded by it during its life, and its obligations cannot be impaired by subsequent legislation

unless it be held that such ordinance is a part of the charter of the company and subject to amendment or repeal under sec. 1, art. XI, Const.

6. Statutes granting to cities the right to make long-time contracts binding on the public and fixing rates to be charged by public-service corporations are not looked upon with favor and will be strictly construed.

7. Where no specific authority had been conferred upon a city to make such a contract, the contract will remain valid between the parties until the state sees fit to exercise its paramount power to fix the rates, and no longer.

8. The governmental power of the state to fix rates was not surrendered by the enactment of sec. 1862, Stats. (1898), or sec. 1863, Stats. (Supp. 1906: Laws of 1901, ch. 425).

9. The right conferred on a railway corporation to use the public streets, under either of said sections, becomes one of the corporate franchises of the corporation, the city acting as the delegated agent of the state in granting it; and, this being so, sec. 1, art. XI, Const., would seem to empower the legislature to modify the conditions on which such franchise was given, as well as to repeal or amend the franchise itself.

10. Ch. 362, Laws of 1905, which is applicable to interurban railways and provides among other things that all charges made by any carrier coming under its provisions "shall be reasonable and just, and every unjust and unreasonable charge . . . is prohibited and declared to be unlawful," did not of its own force work any change in existing rates, and hence did not supersede an ordinance contract by which an interurban railway company was given the right to use the public streets of a city upon condition that a certain rate be charged; though under said statute such rate might be superseded by a determination by the railroad commission.

11. A rate which is unreasonably low can be corrected in such a case as well as one which is unreasonably high; but until affirmative action is taken by the railroad commission the courts cannot relieve a carrier from an improvident contract.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Reversed.*

This action was brought to perpetually enjoin and restrain the defendant from increasing its rates for carrying passengers on its interurban road between the cities of *Manitowoc* and Two Rivers. On October 15, 1900, the city of *Manitowoc*

passed an ordinance granting to Thomas Higgins the right to operate a street railroad upon certain streets in the city of *Manitowoc* upon certain prescribed conditions. By the same ordinance permission was granted to said Higgins to run interurban cars upon certain streets in the city of *Manitowoc*, which cars were to be operated along an interurban line which Mr. Higgins proposed to build to Two Rivers. One of the conditions upon which the right was given to run interurban cars on the streets of the city was that the rate of fare to be charged between said cities should not exceed ten cents for a single trip, during the life of the franchise, which was thirty-five years, and the ordinance provided that it should have no force or effect until its terms and conditions were accepted by the grantee. Such grantee did accept the conditions of the ordinance and constructed the street and interurban railroad contemplated therein. Thereafter the defendant corporation was organized and succeeded to all the rights and property to which said franchise pertained, and on November 24, 1902, at the instance of the traction company and with the consent of Mr. Higgins, an ordinance was passed granting to the traction company the same rights and privileges that had been granted by the former ordinance to Mr. Higgins, subject, however, to the same conditions and liabilities that were contained in the original ordinance. The traction company accepted the terms and conditions of the ordinance of November 24, 1902, and until the year 1909 continued to charge an interurban fare of ten cents between the cities of *Manitowoc* and Two Rivers. On April 25th of that year it made a public announcement that on and after May 1, 1909, it would raise the charge to fifteen cents. This action was commenced to prevent such raise and to compel the defendant to abide by its contract. The defense in substance was that the city in the first instance had no power or authority to exact such a condition and that the portion of the ordinance relating to interurban fares was *ultra vires*. Further, that the ordinance in any event had been

superseded and repealed by subsequent legislative action, and that a fare of ten cents was not compensatory and one of fifteen cents was reasonable.

The trial court found that ten cents is not now a reasonably sufficient fare for travel upon said interurban railway in consequence of increased taxes and other expenses between said cities, and that fifteen cents is not an unreasonable fare. As a conclusion of law the court found that the defendant was bound by the stipulation contained in the ordinance and that it could not exact to exceed a ten-cent fare and that the temporary injunction issued in the action should be made permanent. As a condition of making it permanent, however, plaintiff was required to file a bond with sufficient surety to indemnify the defendant against loss if the judgment should be reversed on appeal. The plaintiff refused to file the bond, and on proof of such failure judgment was entered dismissing the complaint, from which judgment this appeal is taken.

A. L. Hougen, for the appellant, cited the following, among other cases, as sustaining the validity of the ordinance or contract in question: *State ex rel. Att'y Gen. v. Madison St. R. Co.* 72 Wis. 612; *Wright v. Milwaukee E. R. & L. Co.* 95 Wis. 29; *Milwaukee E. R. & L. Co. v. Milwaukee,* 95 Wis. 39; *State ex rel. Vilter Mfg. Co. v. M., B. & L. G. R. Co.* 116 Wis. 142; *State ex rel. Cream City R. Co. v. Hilbert,* 72 Wis. 184, 192; *Linden L. Co. v. Milwaukee E. R. & L. Co.* 107 Wis. 493; *People ex rel. W. S. St. R. Co. v. Barnard,* 110 N. Y. 548; *Mayor, etc. v. D. D., E. B. & B. R. Co.* 133 N. Y. 104; *Detroit v. Ft. W. & B. I. R. Co.* 95 Mich. 456; *Detroit v. Detroit C. St. R. Co.* 184 U. S. 368; *Monroe v. D., M. & T. S. L. R. Co.* 143 Mich. 315, 106 N. W. 704; *Clinton v. Worcester Con. St. R. Co.* 199 Mass. 279; *West Bloomfield v. D. U. R. Co.* 146 Mich. 198, 109 N. W. 258. To the point that the defendant, having accepted the terms of the ordinance, was estopped to deny its validity or the reasonableness of its terms: *State ex rel. Smythe v. Milwaukee Ind. Tel. Co.* 133 Wis.

588; *State v. Milwaukee E. R. & L. Co.* 136 Wis. 179; *Ashland v. Wheeler,* 88 Wis. 607; *Muncie Nat. Gas Co. v. Muncie,* 160 Ind. 97, 66 N. E. 436; *Kansas City v. K. C. B. R. Co.* (*In re Topping Ave.*) 187 Mo. 146, 86 S. W. 190; *People ex rel. Jackson v. Suburban R. Co.* 178 Ill. 594, 53 N. E. 349; *Jersey City v. North Jersey St. R. Co.* 72 N. J. Law, 383, 61 Atl. 95; *Camden & A. R. Co. v. May's Landing & E. H. C. R. Co.* 48 N. J. Law, 530, 7 Atl. 523; *Potter v. Calumet E. St. R. Co.* 158 Fed. 521; *Amesbury v. Citizens' E. R. Co.* 199 Mass. 394, 85 N. E. 419.

For the respondent there was a brief by *Nash & Nash,* and oral argument by *E. G. Nash.* They contended, *inter alia,* that the city had no authority outside its territorial limits. *Schneider v. Menasha,* 118 Wis. 298; *Keefe v. Lexington & B. St. R. Co.* 185 Mass. 183; *South Pasadena v. Los Angeles T. R. Co.* 109 Cal. 315, 41 Pac. 1093; *Galveston & W. R. Co. v. Galveston,* 90 Tex. 398, 36 L. R. A. 33. The power to impose terms did not include power to fix rates. *Detroit v. Detroit C. St. R. Co.* 184 U. S. 368; *Interstate Com. Comm. v. C., N. O. & T. P. R. Co.* 167 U. S. 479; *Peik v. C. & N. W. R. Co.* 94 U. S. 164; *Freeport W. Co. v. Freeport,* 180 U. S. 587; *Home T. & T. Co. v. Los Angeles,* 211 U. S. 265; *Georgia R. & B. Co. v. Smith,* 128 U. S. 174; *Indianapolis v. Navin,* 151 Ind. 139, 41 L. R. A. 337; *Northern Pac. R. Co. v. State ex rel. Duluth,* 208 U. S. 583. In any event the legislature had the right, under the reserved power in the constitution, to change the rates. *Chapin v. Crusen,* 31 Wis. 209; *Att'y Gen. v. Railroad Cos.* 35 Wis. 425; *State ex rel. Cream City R. Co. v. Hilbert,* 72 Wis. 184; *State ex rel. N. P. R. Co. v. Railroad Comm.* 140 Wis. 145; *Winchester & L. T. R. Co. v. Croxton,* 98 Ky. 739, 33 L. R. A. 177; *Buffalo E. S. St. R. Co. v. Buffalo St. R. Co.* 111 N. Y. 132, 2 L. R. A. 384; *Munn v. Illinois,* 94 U. S. 113; *Peik v. C. & N. W. R. Co.* 94 U. S. 164; *Stone v. Wisconsin,* 94 U. S. 181; *Indianapolis v. Navin,* 151 Ind. 139, 41 L. R. A. 337. And ch. 362,

Laws of 1905, which declares that only "reasonable rates" shall be valid and all others are prohibited, had the effect to repeal the ordinance in question so far as it fixes rates. On the question of estoppel they cited, among other cases, *Knoxville v. Knoxville W. Co.* 212 U. S. 1; *Becker v. La Crosse,* 99 Wis. 414; *Allen v. Clausen,* 114 Wis. 244; *Keefe v. Lexington & B. St. R. Co.* 185 Mass. 183.

BARNES, J. The trial court found as a conclusion of law that the plaintiff was entitled to the permanent injunction prayed for. As a condition of granting such relief it required the plaintiff to file within fifteen days an undertaking in the sum of $5,000 with sufficient surety, conditioned that, if on appeal to this court judgment should be awarded to the defendant, the plaintiff would pay such damages as the defendant sustained by reason of the injunction. The plaintiff refused to file the undertaking, and on proof of such fact judgment was entered dismissing the complaint.

The court was in error in awarding any such conditional relief. The case had been fully tried on its merits, and the findings of fact and conclusions of law on the litigated issues made and found by the court formed the basis for the final judgment that should be entered. Either the plaintiff was entitled to relief or it was not. If it was, the granting of that relief should not be made dependent on its ability to furnish a bond, or even on its willingness to assume the liability exacted, if it could furnish the bond. Sec. 9 of art. I of our constitution provides:

"Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive in his person, property or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws."

It seems quite clear that this provision of the constitution was overlooked and was violated in the instant case.

It is unnecessary to consider the ordinance of October 15, 1900, whereby certain rights and privileges were granted to Thomas Higgins, or the subsequent ordinance of November 24, 1902, whereby like privileges were granted to the *Manitowoc & Northern Traction Company,* except in so far as these ordinances relate to the rate of fare to be charged between *Manitowoc* and Two Rivers. Both of these ordinances granted the right to run interurban cars over the streets of the city of *Manitowoc* on the condition that the rate charged for a single fare between the two cities should not exceed ten cents. Each provided that it should not have any force or effect until its provisions were accepted by the grantee of the privilege, and Mr. Higgins accepted such condition in the first instance and the traction company accepted the condition of the second ordinance. The language of the last acceptance is in part as follows:

"*The Manitowoc & Northern Traction Company* . . . does . . . accept all and each and every of the grants, privileges and franchises created, granted or conveyed to said traction company by said ordinance, and you, the said mayor, and board of aldermen, and the said city of *Manitowoc,* are hereby notified that it is the intent of said traction company . . . to accept said ordinance and all the grants, rights, privileges and franchises therein specified . . . and to become and be and remain bound by the contract effected by said ordinance and this acceptance thereof according to the true intent and purpose of said ordinance."

We shall waste no time in discussing the proposition that this ordinance and the acceptance of it constituted a contract in form. The real questions involved in the case are three in number: (1) Did the parties have the power to make the contract? (2) If so, to what extent is it binding and enforceable? (3) Has it been lawfully superseded or nullified?

1. That the traction company had the right on its part to make a contract fixing the rate of charge for a given service, provided such contract violated no law and was not inimical

to public policy, is clear enough. By so doing it could not forestall the state and prevent it from exercising its governmental function regulating rates. But until the state sees fit to interpose, the carrier ordinarily may exercise a free hand in fixing rates, subject to the qualification that they must not be unreasonably high and must not be unjustly discriminatory. In order to have a binding contract there must be mutuality of obligation, and whatever doubt arises on the branch of the case we are considering arises in reference to the right of the city to make the particular contract before us.

There was no law inhibiting the making of the contract involved, at the time it was entered into, and there is nothing to show that it was discriminatory or against public policy. It was no doubt contemplated by the city that its residents would be liberal patrons of the road, and the consideration which it gave for the rate of fare fixed was the right to run the interurban cars in the streets of the city. The right of the city to make the contract which it did, in so far as it had any statutory right to do so, is found in sec. 1863, Stats. (1898), as amended by ch. 425, Laws of 1901. It was held in *Milwaukee L., H. & T. Co. v. M. N. R. Co.* 132 Wis. 313, 112 N. W. 663, that sec. 1862, Stats. (1898), applied only to street railway companies, and that sec. 1863 applied to both street and interurban railways. Prior to the passage of ch. 425, Laws of 1901, sec. 1863 contained no provision to the effect that interurban railways might pass through cities by obtaining the consent thereof. That law amended sec. 1863, Stats. (1898), so as to provide that

"Any street railway corporation may extend its railway to any point within any town adjoining a municipality from which it derived its franchise. . . . Corporations may be formed and governed in like manner as is provided in sec. 1862 for the purpose of building, maintaining and using railways . . . in any city, village or town or to extend from any point in one city, village or town to, into or through any other city, village or town, . . . and for that purpose, with

the consent of the common council of any city, the board of trustees of any village and the written consent of a majority of the supervisors of any town in, into or through which such railway . . . may extend, may lay and operate their railways . . . upon, across and along any highway. . . . In any city or village the consent of the common council or board of trustees shall be given by ordinance, and upon such terms and subject to such rules and regulations and the payment of such license fees as the common council or board may prescribe."

There is no material difference in the provisions of these two sections in so far as they pertain to the matter of giving consent to the use of the public streets. Sec. 1862, Stats. (1898), authorizes a city to grant the use of a street to a street railway company upon such terms as the proper authorities shall determine, while sec. 1863, Stats. (Supp. 1906: Laws of 1901, ch. 425), authorizes an interurban railway company to use the streets of the city provided its consent is obtained, and such consent may be given upon such terms as the common council may prescribe. The first ordinance was passed before ch. 425, Laws of 1901, became a law, and therefore before we had any statute expressly authorizing a city to consent that the cars of an interurban railway company might be run over its streets. The franchise was also granted to an individual instead of a corporation. *Allen v. Clausen,* 114 Wis. 244, 90 N. W. 181, was decided in this court in April, 1902, in which it was held that a city had no authority to grant such a franchise to an individual and that the grantee should be a corporation organized in the manner provided by statute. The ordinance of November, 1902, was no doubt applied for and obtained because it was assumed that the former ordinance was void for the reasons stated, the railway property having in the meantime been transferred to a corporation capable of taking it, as well as the necessary franchises to operate it. It is immaterial whether the original ordinance is valid or void. *Ashland v. Wheeler,* 88 Wis. 607, 60 N. W. 818. The legality of the second ordinance is not attacked in

its entirety, although some of its provisions are claimed to be *ultra vires.*

This court has repeatedly held that the use of city streets by interurban cars subjected them to an additional burden for which the property owner must be compensated. *Chicago & N. W. R. Co. v. M., R. & K. E. R. Co.* 95 Wis. 561, 70 N. W. 678; *Zehren v. Milwaukee E. R. & L. Co.* 99 Wis. 83, 74 N. W. 538; *Beloit, D. L. & J. R. Co. v. Macloon,* 136 Wis. 218, 224, 116 N. W. 897; *Schuster v. Milwaukee E. R. & L. Co.* 142 Wis. 578, 583, 126 N. W. 26.

This court has also held that interurban railways could not exercise the right of condemnation given by sec. 1863*a,* Stats. (1898), unless the consent of the municipality in which the right was sought to be exercised had been obtained in the manner provided by secs. 1862 and 1863. *Milwaukee L., H. & T. Co. v. M. N. R. Co.* 132 Wis. 313, 112 N. W. 663; *Beloit, D. L. & J. R. Co. v. Macloon, supra; In re Plowright,* 140 Wis. 512, 122 N. W. 1043; *Milwaukee L., H. & T. Co. v. Burlington E. L. & P. Co.* 142 Wis. 436, 441, 125 N. W. 932; *Schuster v. Milwaukee E. R. & L. Co., supra.*

The logic of the decisions cited from our own court leads to the conclusion that a city, if it sees fit, may refuse to grant an interurban railway company the right to run cars over its streets. The decisions elsewhere made under like statutes are to the same effect. *Galveston & W. R. Co. v. Galveston,* 90 Tex. 398, 39 S. W. 96, 36 L. R. A. 33; *Pacific R. Co. v. Leavenworth,* 1 Dill. 393; *Atchison St. R. Co. v. Nave,* 38 Kan. 744, 17 Pac. 587; *Northern Cent. R. Co. v. Baltimore,* 21 Md. 93; *Indianapolis & C. R. Co. v. Lawrenceburg,* 34 Ind. 304; *Indianola v. G., W. T. & P. R. Co.* 56 Tex. 594; *Detroit v. Ft. W. & B. I. R. Co.* 95 Mich. 456, 54 N. W. 958; *Monroe v. D., M. & T. S. L. R. Co.* 143 Mich. 315, 106 N. W. 704; *People ex rel. West Side St. R. Co. v. Barnard,* 110 N. Y. 548, 18 N. E. 354. See, also, *State ex rel. Att'y Gen. v. Madison St. R. Co.* 72 Wis. 612, 40 N. W. 487.

In the case before us the city did give its consent, and the real question is, Did it have the right to impose the terms which it undertook to impose as a condition to such consent?

Under a statute not unlike our sec. 1862, Stats. (1898), the city of Detroit, subsequent to the construction of a street railway, passed an ordinance regulating the rate of fare to be charged. Speaking of the power of the city under such a statute the court said:

"The right of a municipality, under the statute, to refuse its consent to the operation of a street railway in its streets, is an absolute one, and its power, in the first instance, to impose conditions, is unlimited. The nature of the condition imposed does not depend upon other grants of power. Respecting the imposition of further conditions after consent given, it is only necessary that the municipality keep within the scope of the reservation." *Detroit v. Ft. W. & B. I. R. Co., supra.*

In *People ex rel. West Side St. R. Co. v. Barnard, supra,* it is held that under a statute authorizing a city "to secure adequate compensation for the right to construct . . . street railroads in cities," it was within the power of the city to prescribe the rates which should be charged as a condition of giving such consent.

In *Clinton v. Worcester Con. St. R. Co.* 199 Mass. 279, 85 N. E. 507, it was held, under a statute authorizing the aldermen of cities through which street railway companies intended to pass to impose "such restrictions" upon such companies as "they deemed the interests of the public might require," that consent to the use of the streets might be given upon condition that children be transported to and from the public schools, and to and from the state normal school located at Worcester, at half fare.

In *Pacific R. Co. v. Leavenworth, supra,* a Kansas statute forbade a railway company to construct its road upon the streets of an incorporated city "without the assent of the corporate authorities." Consent was granted on the condition that the railway company should build a depot in a certain

part of the city and "grade, riprap, and pave the street it used." The company agreed to accept the use of the street on such terms. It was held that the city had the lawful right to make the condition, and that the company, having consented to it, was bound by its contract.

In *Atchison St. R. Co. v. Nave, supra,* it was held, under the Kansas statute above referred to, that the city might give its consent to the occupancy of its streets by a railway company on condition that the railroad be built within six months.

In *Indianapolis & C. R. Co. v. Lawrenceburg,* 34 Ind. 304, consent to the use of the streets by a railroad company was given on condition that "where the grade of said road shall be higher than such street, alley or public ground, the said company shall fill up on each side of their said road to form a convenient passage over the same." The grade of the street was changed after the road was built, and it was held that the railroad company was liable for the cost of doing the work stipulated for in the ordinance granting consent.

In *Indianola v. G., W. T. & P. R. Co.* 56 Tex. 594, consent was granted to a railway company to use a public street on condition that the company extend its road a certain distance beyond the town and execute a bond in the sum of $50,000 as stipulated damages conditioned for the faithful performance of the agreement. The statute in force empowered the railway company to use a public street, but provided that the city might object to the use of the particular street selected, and on objection being made it was further provided that the governor might appoint some competent person to select a route. Objection was made to the use of the street selected, which objection was removed by the company assenting to the condition proposed and filing its bond as required. Thereafter it refused to extend the road as agreed. In an action brought upon the bond it was held that the contract was not *ultra vires* and that the city might recover the penalty prescribed in the bond because of the breach of the contract.

In *Omaha W. Co. v. Omaha,* 147 Fed. 1, 12 L. R. A. N. S. 736, the statute involved empowered the city of Omaha to contract for the construction and maintenance of "waterworks on such terms and under such regulations as may be agreed on." It was held that the statute authorized the city to enter into a contract for the construction of waterworks and to provide for the rates at which the contractor should furnish water to private consumers.

In *Walla Walla v. Walla Walla W. Co.* 172 U. S. 1, 19 Sup. Ct. 77, the statute involved empowered the city of Walla Walla to erect or to authorize the erection of waterworks and to permit the use of the streets for the purpose of laying pipes for a term not exceeding twenty-five years, and it was held that this provision authorized the city to enter into a contract granting a water company the right to lay its pipes for twenty-five years, and to agree on its part that so long as the contract remained in force the city would not itself construct waterworks.

In *Vicksburg v. Vicksburg W. W. Co.* 202 U. S. 453, 26 Sup. Ct. 660, the statute involved authorized the city of Vicksburg to contract for the erection and operation of a system of waterworks, and it was held thereunder that the city might lawfully, as a term of the contract for the construction of such waterworks, give the grantee the exclusive right to erect and maintain waterworks for a definite period of time, during which it could not erect its own system in opposition to that of the company receiving the franchise.

The cases relied upon by the respondent as establishing a contrary doctrine are *Galveston & W. R. Co. v. Galveston,* 90 Tex. 398, 39 S. W. 96, 36 L. R. A. 33, and *South Pasadena v. Los Angeles T. R. Co.* 109 Cal. 315, 41 Pac. 1093. The Texas case is not in point. It was there held that the city could not oust the railway company for failure to comply with its contract, because the destruction of the railroad might operate to the disadvantage of the public. The court did not

hold that an appropriate action might not be brought either to recover damages for the breach of the contract or to compel the railway company to comply with it, and there is no intimation in the decision that it was intended to overrule *Indianola v. G., W. T. & P. R. Co.* 56 Tex. 594, which covers the precise situation presented in the case before us.

The California case is in point to the proposition to which it is cited. The decision goes upon the ground that it would be against good public policy to permit a city to dictate the rates of fare that should be charged outside of its boundaries, because the general public is interested in such rates and should not be concluded by the action of a single city. We think this decision overlooks the important fact that the general public was not concluded by the agreement. That question will be subsequently discussed.

Inasmuch as the city might on any terms refuse its consent to the use of its streets by interurban cars, we see no reason why it might not exact any conditions it saw fit, provided they were not unlawful in themselves, and as to the parties to the contract there was nothing unlawful about the condition we are considering. The decided cases fully sustain this view. We therefore hold that the parties were competent to make the contract entered into.

The statutes under consideration are not analogous to sec. 1778, Stats. (1898), which was construed to extend to telephone companies, in *State ex rel. Wis. Tel. Co. v. Sheboygan,* 111 Wis. 23, 86 N. W. 657; *State ex rel. Smythe v. Milwaukee Ind. Tel. Co.* 133 Wis. 588, 114 N. W. 108, 315; and *Wis. Tel. Co. v. Milwaukee,* 126 Wis. 1, 104 N. W. 1009. When these decisions were made, telegraph and telephone companies not only received their franchises directly from the state, but they were expressly authorized by the state to use the public streets and highways under prescribed conditions without any permission or consent from the municipalities in which their lines were built. Cities, in the exercise of the

general police powers conferred on them, might prescribe reasonable regulations governing the use of streets by such companies, and in the cases referred to it was merely held that a city under the guise of such power could not wholly exclude such companies from using its streets, but was restricted under the law to the exercise of legitimate police regulations.

2. We next come to a consideration of the question of the extent to which the contract before us is binding and enforceable. That the legislature of the state might expressly empower cities to make such contracts as the one in question is well settled. In passing such an ordinance as we have before us, a city, proceeding under a grant of power specifically conferred, acts as the agent of the state, and the public is concluded by the contract during its life, and its obligations could not be impaired by subsequent legislative action, unless it were held that the ordinance was part of the charter of the railway company and subject to amendment or repeal under sec. 1, art. XI, of our constitution. Otherwise, a state may, in matters of proprietary rights, exclude itself and authorize its municipal corporations to exclude themselves from the right of regulating rates. *Vicksburg v. Vicksburg W. W. Co.* 202 U. S. 453, 26 Sup. Ct. 660; *Cleveland v. Cleveland City R. Co.* 194 U. S. 517, 24 Sup. Ct. 756; *Detroit v. Detroit C. St. R. Co.* 184 U. S. 368, 382, 22 Sup. Ct. 410; *New Orleans W. W. Co. v. Rivers,* 115 U. S. 674, 6 Sup. Ct. 273; *St. Tammany W. W. v. New Orleans W. W.* 120 U. S. 64, 7 Sup. Ct. 405; *Walla Walla v. Walla Walla W. Co.* 172 U. S. 1, 9, 19 Sup. Ct. 77; *Los Angeles v. Los Angeles City W. Co.* 177 U. S. 558, 20 Sup. Ct. 736; *Home T. & T. Co. v. Los Angeles,* 211 U. S. 265, 29 Sup. Ct. 50; *Knoxville v. Knoxville W. Co.* 212 U. S. 1, 29 Sup. Ct. 148; *Nelson v. Murfreesboro,* 179 Fed. 905, and cases cited on page 908.

Statutes granting to cities the right to make long-time contracts binding on the public and fixing a rate to be charged by a public-service corporation are not looked upon with favor

and will be strictly construed. It is only where the right is very clearly conferred that the state will be held to have relinquished its power to enact laws regulating tolls. *Freeport W. Co. v. Freeport,* 180 U. S. 587, 588, 21 Sup. Ct. 493; *Detroit v. Detroit C. St. R. Co.* 184 U. S. 368, 388, 22 Sup. Ct. 410; *Chicago, M. & St. P. R. Co. v. Minnesota,* 134 U. S. 418, 456, 10 Sup. Ct. 462, 702; *Stanislaus Co. v. San Joaquin & K. R. C. & I. Co.* 192 U. S. 201, 210, 24 Sup. Ct. 241; *Georgia R. & B. Co. v. Smith,* 128 U. S. 174, 9 Sup. Ct. 47; *Ruggles v. Illinois,* 108 U. S. 526, 2 Sup. Ct. 832; *Home T. & T. Co. v. Los Angeles, supra.*

No specific authority having been conferred on the city to enter into the contract in question, the right of the state to interfere whenever the public weal demanded was not abrogated. The contract remained valid between the parties to it until such time as the state saw fit to exercise its paramount authority, and no longer. To this extent, and to this extent only, is the contract before us a valid subsisting obligation. It would be unreasonable to hold that by enacting sec. 1862, Stats. (1898), or sec. 1863, Stats. (Supp. 1906: Laws of 1901, ch. 425), the state intended to surrender its governmental power of fixing rates. That power was only suspended until such time as the state saw fit to act. *Ashland v. Wheeler,* 88 Wis. 607, 60 N. W. 818; *Home T. & T. Co. v. Los Angeles, supra; Freeport W. Co. v. Freeport, supra; Stanislaus Co. v. San Joaquin & K. R. C. & I. Co., supra.* Furthermore, the right conferred on a railway company to use the public streets, under sec. 1862 or sec. 1863, becomes one of the corporate franchises of the corporation to which it is granted, the city acting as the delegated agent of the state in granting it. *State ex rel. Att'y Gen. v. Madison St. R. Co.* 72 Wis. 612, 40 N. W. 487; *Wright v. Milwaukee E. R. & L. Co.* 95 Wis. 29, 36, 69 N. W. 791; *State ex rel. Milwaukee St. R. Co. v. Anderson,* 90 Wis. 550, 565, 63 N. W. 746; *State ex rel. Rose v. Superior Court,* 105 Wis. 651, 673, 81

N. W. 1046; *State ex rel. Att'y Gen. v. Portage City W. Co.* 107 Wis. 441, 445, 83 N. W. 697; *Allen v. Clausen,* 114 Wis. 244, 90 N. W. 181. This being so, the reserved power of amendment or repeal, contained in sec. 1, art. XI, Const., would seem to empower the legislature to modify the conditions on which such franchise was given, as well as to repeal or amend the franchise itself. *Chapin v. Crusen,* 31 Wis. 209; *West Wis. R. Co. v. Trempealeau Co.* 35 Wis. 257; *Att'y Gen. v. Railroad Cos.* 35 Wis. 425.

3. Whether the state has exercised its right to modify this rate remains to be considered. Ch. 362, Laws of 1905, applies to interurban railway companies. *In re Application of Ch. 362, Laws of 1905, to Certain Street Railways,* 1 Wis. R. R. Comm. Rep. 178. By that statute (sec. 3) it is provided that all charges made by any carrier coming under its provisions "shall be reasonable and just, and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful." Railway companies are required to file their tariffs with the railroad commission and are prohibited from making changes therein except on ten days' notice, and the rates fixed in such tariffs are declared to be the lawful rates until changed as provided by the act. Sec. 12 of the law provides that the commission may, on complaint or on its own motion, proceed to determine the reasonableness of any rate, and, whenever such rate is found to be unreasonable, may fix and determine what a reasonable charge shall be, and thereupon the rate so fixed shall be the lawful rate. By subd. "c" of sec. 12 a railway company is given the same right to make complaint that is given to any other person or corporation.

It is contended that this law has superseded the contract involved in this suit and that therefore the contract no longer has any binding force or effect. We do not think so. The statute worked no change in existing rates. It simply provided that all rates should be reasonable, and left to the rail-

road commission the power to determine the fact as to whether or not a given rate was reasonable. When that determination was reached the law became operative upon the particular rate called in question and the rate arrived at then became the lawful rate and continued so until set aside in the manner provided by the law. The railroad commission has made no determination in the case before us; at least, if it has, it is no part of the record. Until that determination is made the contract is in force. When it is made the contract is superseded, if the rate is changed. The commission has ample authority to proceed upon its own motion. The traction company, under subd. "c" of sec. 12, has power to make the necessary complaint to compel an investigation. This works no hardship on any one. It may be, as the trial court found, that a ten-cent fare is unreasonable and that a fifteen-cent fare is not so. Usually, long-time contracts made under like conditions operate against the public interest, and, if the fare provided for is unreasonably low, the legislature has the same power over it that it would have if it were unreasonably high. It may also be that adequate service cannot be given at the rate fixed or that conditions have so changed that the road cannot be operated unless rates are increased and that the public will be better served by raising the rate than by permitting it to remain where it is. This is a question which calls for the exercise of legislative policy and discretion. The court cannot relieve the defendant from an improvident contract, but the contract is of such a character in the present instance that the legislative branch of the government may, in the interest of the public, abrogate it. If, as is contended by counsel for the respondent, no contract was entered into and we were dealing with the ordinance as a legislative enactment pure and simple and not as part and parcel of a contract, there might be good reason for the claim that it is superseded by ch. 362, Laws of 1905, without any affirmative action on the part of the railroad commission. But such is not the case before us.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded with directions to enter judgment enjoining the defendant from changing the rates of fare between the cities of *Manitowoc* and Two Rivers provided for in the ordinance of November 24, 1902, until such time as such rates are changed by the legislature or through a legislative agency in the manner provided by law.

BARTELT, Respondent, vs. SMITH, Appellant.

January 12—January 31, 1911.

Partnership: What constitutes: How proven: Firm property: Realty: Statute of frauds: Action for dissolution: Receivers: Appointment of party: Compensation: Estoppel: Counsel fees.

1. If two or more persons engage in a joint business enterprise, each putting in capital or labor or both, with an agreement to share profits as such, that will constitute them partners, whatever they may call themselves.
2. A contract of partnership may be proven by evidence of acts and conduct of the parties from which it may be inferred that they have agreed to become partners and share profits as such.
3. Whether or not a telephone line is real estate, if it be contributed to the capital of a copartnership it will become firm property so far as paying the firm debts and closing out the partnership is concerned, even though the legal title remain in one partner; and the agreement of copartnership, though not in writing, is not void under the statute of frauds.
4. A party to an action will not ordinarily be appointed receiver therein unless both parties consent or there are special circumstances which make such an appointment clearly for the best interests of all concerned, the reason being that the receiver is an officer of the court and should be disinterested.
5. Where a party to an action is appointed receiver therein, the general rule is that he is entitled to no compensation for his services, especially in an action for dissolution of partnership.
6. Where the order appointing one partner receiver of the partnership business and assets recited the other partner's consent

thereto, "providing the fees of the receiver could be avoided thereby," such receiver is estopped from claiming compensation; and it makes no difference that the receivership lasted much longer than was expected.

7. The employment by a receiver of counsel who represented him as a party, while not a practice to be approved, does not necessarily debar such counsel from all compensation, but where his services related to the details of the receiver's duties, such as the sale of the property, drawing and submitting of his report, and other matters as to which there is no conflict but rather a community of interest between the parties, a reasonable bill therefor may be allowed.

APPEAL from a judgment of the circuit court for Sheboygan county: MICHAEL KIRWAN, Circuit Judge. *Modified and affirmed.*

This is an action to dissolve a partnership and for an account of the partnership business. The alleged partnership business was a small rural telephone business, amounting to about fifty miles of line in several adjoining townships of Fond du Lac, Washington, and Sheboygan counties. The defendant by answer denied the existence of any partnership and claimed to be the sole owner of the telephone system in question and that the same was wrongfully seized and taken possession of by the plaintiff. The action was commenced in March, 1905, and upon motion the plaintiff in May following was appointed receiver of the business, with directions to continue the business until the further order of the court. Afterwards the action was referred to Francis Williams, Esq., as referee, to hear, try, and determine. The referee took the testimony and in March, 1907, made his report, in which he found as matters of fact (1) that the parties formed a partnership November 2, 1902, for the purpose of conducting a telephone business over the lines in question, agreeing to share profits and losses equally; (2) that such partnership acquired the lines in question and operated the same down to the time of the commencement of the action; (3) that the parties had many disagreements as to the management of the business and

that it was impossible for them to longer carry on business together; (4) that plaintiff was appointed receiver of the business and still operated the same; (5) that plaintiff had paid into the business for the purpose of carrying it on sums aggregating $696.78 and drawn out sums aggregating $766.81, leaving him indebted to the business at the time of his appointment as receiver in the sum of $70.03; (6) that defendant put no money into the business, but drew out amounts aggregating $309.96, in which sum he was indebted to the partnership. As conclusion of law the referee found that judgment of dissolution should be rendered and that the property and business should be sold and the proceeds divided equally after adding to the proceeds of the sale the amounts found due the firm from each partner.

Upon motion the report and findings of the referee were confirmed by the court, with a modification or amendment providing that plaintiff should have judgment against defendant for his costs and disbursements and that the same should be a charge on defendant's portion of the assets. An interlocutory judgment was rendered April 10, 1908, adjudging the parties to be owners as partners of the telephone lines in question with the appurtenances and all permits and privileges connected therewith; that such partnership be dissolved; and that the receiver convert the property into cash, pay all partnership debts, and make report of the balance in his hands. The receiver made sale of the partnership property and business and made his report to the court showing his total receipts from operation of the business and sale of the property to be $4,903.23 and his disbursements to be as follows:

Incidental expenses	$503 35
Expenses for labor, care, etc.	419 89
Expense for operating	467 00
Expense for teams and horses	147 51
Counsel fees subject to approval by court	119 88
Personal compensation and charges subject to approval by the court	911 25
	$2,568 88

Upon motion to approve the receiver's report defendant's counsel raised no question of fact, but objected to the items of compensation to the receiver and counsel fees. The report was approved with two amendments, one adding $40 to the counsel fees and the other inserting a credit of $314.50 paid by the receiver on a note of the firm after the filing of his account, and judgment entered dividing the net assets, after payment of the receiver's charges and expenses, equally between the parties, and allowing plaintiff to retain out of the defendant's share his taxed costs and disbursements. From this judgment the defendant appeals.

The cause was submitted for the appellant on the brief of *Simon Gillen,* attorney, and *Charles A. Phelps* and *John A. Irrmann,* of counsel, and for the respondent on that of *T. L. Doyle.*

WINSLOW, C. J. The pivotal question upon the merits of the case is whether the evidence justifies the referee's finding that the parties were partners. No formal agreement of partnership was ever made, although a written agreement was drawn by defendant but never signed by the plaintiff. The referee arrived at his conclusion as an inference of fact from the conduct of the parties themselves during the time from November 2, 1902, to March, 1905, during which time they confessedly operated the telephone system together and appeared to be partners. The fact was undisputed that *Smith* took such title as was taken to the original stem of the system, which was bought of one Drescher, and it was also undisputed that plaintiff advanced all the money necessary to make the original purchase, to buy new material, and to operate the business. From this time the parties operated the business together, the exchange being located in the plaintiff's house. There were many pages of testimony taken, and this opinion might be extended to great length in reviewing the evidence on the subject, but it does not seem that any valuable purpose would be gained thereby.

It is true, as claimed by counsel for appellant, that there can be no partnership as between the parties themselves unless a contract of partnership be shown, and that it must include an agreement to share profits as profits, *i. e.* as common owners thereof. *Sullivan v. Sullivan,* 122 Wis. 326, 99 N. W. 1022. But it is not necessary that the partners should call themselves such. If they engage in a joint business enterprise, each putting in capital or labor or both, with an agreement to share profits *as such,* there will be a partnership whatever they may call themselves. Nor need an express contract, either written or oral, be shown. Like other contracts which the law does not require to be in writing, a contract of partnership may be proven by circumstantial evidence, that is, by showing acts and conduct of the parties from which the fact may be inferred that the parties have agreed to become partners and share profits as such. 22 Am. & Eng. Ency. of Law (2d ed.) 39, 40, 47, 48; *Voshmik v. Urquhart,* 91 Wis. 513, 65 N. W. 60. We have examined the evidence in this case and find much to sustain the finding of the referee that the parties here became partners. Many of the acts of both plaintiff and defendant are only consistent with the theory that they had agreed to become partners in the enterprise and share the profits as profits.

The claim is made that the telephone system in question was real estate and that a parol agreement of partnership would be void, because it would offend against the statute of frauds. It is unnecessary to consider whether the telephone lines in question were real property or not. If they were, and if *Smith* held the legal title thereto, still, if they were contributed to the capital of the firm business, they would assume the character of firm property so far as paying the debts and closing out the partnership is concerned, even though the legal title remained in *Smith.* This is elementary.

We think the appellant's objection to the allowance of the item of $911.25 in the receiver's account for compensation should have been sustained.

The general principle, very well settled in the books, is that a party to the cause will not ordinarily be appointed receiver unless both parties consent or there are special circumstances present which make such an appointment clearly for the best interest of all concerned. The reason is that the receiver is an officer of court, whose business it is to administer his trust impartially for the benefit of all concerned, and hence he should have no special interests which might influence him in his conduct of the trust in matters where his interests and the interest of any party to the action may clash. 23 Am. & Eng. Ency. of Law (2d ed.) 1034. Where a party is appointed, however, the general, though perhaps not universal, rule seems to be that he is entitled to no compensation for his services, especially in case of the appointment of a partner as receiver on dissolution of the partnership. High, Receivers, § 540; 34 Cyc. 468.

In the present case there is an additional reason why no compensation should be allowed. Upon the plaintiff's motion for the appointment of a receiver it appears by the recitals of the order that the attorneys for the defendant appeared, and the order then proceeds as follows:

"And the attorneys for the defendant having stated in open court that if the court should see fit to appoint a receiver the defendant would have no objection personally against the plaintiff, *August G. Bartelt,* being left in possession and management of the property, providing the fees of the receiver could be avoided thereby."

At the close of this recital the court proceeds to make the appointment of the plaintiff. This order was made by Judge FOWLER at Fond du Lac, while the final judgment in the case was rendered by Judge KIRWAN at Sheboygan. This recital was evidently considered of considerable importance by Judge FOWLER, for a part of it was interlined after the typewritten order had been prepared. We can construe it in no other way except as meaning that the defendant consented

to the appointment of *Mr. Bartelt* upon the proviso only that in case of his appointment there would be no fees charged for the receivership. If this be so (and on any other theory the insertion of the recital seems to be unnecessary surplusage), then it is entirely clear to our minds that no fees should be allowed. *Mr. Bartelt's* name was evidently proposed by his own counsel. The defendant had a right to make strong objection to it, but he announced that he would forego that right if the payment of receiver's fees could be avoided by *Bartelt's* appointment. Upon this statement *Mr. Bartelt* was appointed. Plain principles of estoppel must now prevent him from claiming compensation, and the fact that the receivership lasted much longer than was anticipated can make no difference. This item, therefore, was improperly allowed.

The charge for counsel fees is attacked for the reason that the plaintiff should not, as receiver, have consulted the counsel who represented him as a party, because their advice would probably not be impartial. The general rule that receivers should not employ the counsel of either party to the litigation is approved and very forcibly stated in *Speiser v. Merchants' Exch. Bank,* 110 Wis. 506, 86 N. W. 243, and we have no intention of modifying anything that is there said. It is there recognized, however, that where it is made clear that their services to the receiver were of such a nature that no clash of interests was involved between their duties as counsel for the party and as counsel for the receiver, payment for their services may be approved. This is certainly reasonable doctrine. If, as appears in the present case, the advice of counsel was simply with relation to details of his duties, assisting him at the sale of the property and drawing and submitting his report, all being matters as to which there was no conflict but rather community of interest between the parties, we think a reasonable bill, such as was here allowed, for counsel fees to plaintiff's own counsel may be properly approved, though the practice is not to be advised. The result

is that the net amount of assets, including the amounts due the firm from each partner, is $3,271.09, instead of $2,359.84 as adjudged by the court; of which each is entitled to half after deducting his firm debt, making *Bartelt's* share $1,565.51 and *Smith's* share $1,325.58. From *Smith's* share must be deducted plaintiff's costs, $258.02, leaving a balance due him as of the date of the judgment of $1,067.56, instead of $611.94 as adjudged by the court. The judgment must be modified to agree with these results.

By the Court.—Judgment modified as indicated in the opinion, and as so modified affirmed, with costs to the appellant.

NELSON, Respondent, vs. KRESS, Appellant.

January 12—January 31, 1911.

Action: Dismissal: Settlement of controversy: Contracts: Partial writing: Parol evidence: Corporations: Ownership of stock: Title in trust: Evidence.

1. Where, after commencement of an action to determine the ownership of corporate stock held by defendant and claimed by plaintiff, the stock was transferred to plaintiff pursuant to an agreement that he should pay therefor if defendant was found to be the owner and that the action should proceed to determine the rights of the parties, the controversy remained and defendant was not entitled to dismissal of the action.
2. Where there is an entire oral contract and a writing made merely in part execution thereof, the remainder of the contract may be established by parol.
3. Where, under an oral agreement, the stock of a corporation, consisting of twenty shares, was to be owned by three persons equally, but a certificate for ten shares was issued to one of them, who was to hold three and one-third shares thereof in trust for the other two, and he gave to them a writing stating, "If I sell *my ten shares* I will pay [the other two persons] the difference in value between one half and one third of the stock,"

proof of the oral contract, together with such writing, is sufficient to overcome the written evidence (consisting of the stock certificate and records of the corporation) that the holder of the certificate was the absolute owner of the ten shares; and the oral contract shows also that the words "my ten shares" refer merely to the status of the legal title.

APPEAL from a judgment of the circuit court for Manitowoc county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

Action in equity for cancellation of a certificate for ten shares of stock in the Herald-Press Publishing Company, held by defendant, and issuance of a certificate for three and one-third of such shares to plaintiff.

The facts claimed by plaintiff and put in issue by defendant were these: In 1899 the Herald-Press Publishing Company was formed by plaintiff and one Brandt, owners of a printing business, and defendant, owner of a rival business, for the purpose of combining the two enterprises. Precedent to such combination it was agreed that a corporation should be formed, the two newspaper properties be conveyed thereto as an equivalent for the capital stock of twenty shares, the same, as between the parties, to be one third owned by each person, but for political reasons defendant *Kress* to hold in his name ten shares, three and one-third shares thereof, however, to be treated as held in trust for plaintiff and Brandt and to be transferred to them if they at any time should deem that necessary for protection of their interests. The scheme was consummated by organization of the corporation, transfer of the two properties thereto, and issuance of the twenty shares of stock, one half to defendant and one quarter to each of the other persons. *Kress,* as evidence of his obligation in respect to the three and one-third shares, gave plaintiff and Brandt a paper to the effect that in case of his selling or transferring the ten shares held by him he would account to them for three and one-third shares thereof. Subsequently plaintiff acquired Brandt's interest in the corporation. Thereafter he and *Kress* for some five years conducted the

business as owners with the understanding that plaintiff's interest was two thirds and defendant's one third. Then difficulties arose, followed by defendant repudiating plaintiff's claim of ownership of more than a half interest in the corporation. In that situation *Kress* asserted authority, as president, to wholly control the corporate affairs and took steps for the election of directors so as to exclude plaintiff from any participation in the management thereof. Thereupon this action was brought, in part to determine the title to the three and one-third shares.

Defendant answered, among other things, that he became and was at the time of the commencement of the action absolute owner of the ten shares of stock issued to him, and pleaded that, subsequent to such commencement, he settled his differences with plaintiff by transferring to him such shares.

At the outset the corporation was made a defendant. Thereafter, an arrangement having been made whereby *Kress* transferred all stock held by him to plaintiff, the action against the corporation was dismissed.

There was evidence tending to prove all the allegations of the complaint and that the transfer of ten shares made to plaintiff after the action was commenced, was without prejudice to its continuance for the purpose of establishing the rights of the parties as regards the disputed three and one-third shares.

The court took an advisory verdict. The jury found all disputed questions as to ownership of the three and one-third shares in favor of the plaintiff. The court filed findings approving those made by the jury and, further, that after the commencement of the action defendant transferred the ten shares held by him to plaintiff, not in settlement of the litigation, but without prejudice to continuance thereof for the purpose of establishing the rights of the parties as to the three and one-third shares, plaintiff paying a specified con-

sideration upon the basis of defendant's actual ownership being of six and two-thirds shares and agreeing to pay a stipulated sum in addition in case of its being determined in the action pending, or any other action, that defendant was the owner of the three and one-third shares as he claimed. The court further found, on this, in favor of plaintiff. Judgment was ordered and rendered accordingly.

The cause was submitted for the appellant on the brief of *Hougen & Brady,* and for the respondent on the briefs of *Nash & Nash.*

MARSHALL, J. The judgment must be affirmed. Neither of the reasons advanced in favor of a reversal seems to have sufficient merit to call for more than brief consideration.

The first suggestion is that after the stock was transferred to respondent there was no controversy left to be settled and so the action should have been dismissed. The transfer of the stock was made pursuant to an agreement in writing to the effect that the litigation might proceed to determine the rights of the parties as to the disputed ownership. That is the fair import of the written agreement as we read it.

The next proposition is that the agreement pursuant to which the stock was issued was in writing, therefore parol evidence of title was incompetent. The agreement respecting the formation of the corporation to combine the two newspaper properties, was not reduced to writing. Counsel refer to papers which were made in the course of carrying out the verbal contract. The whole agreement never was put in writing or intended to be. That is quite plain from the record. It is a familiar rule that where there is an entire verbal contract and a writing merely made in part execution thereof the balance may be established by parol. *Burhans v. Johnson,* 15 Wis. 286; *Agnew v. Baldwin,* 136 Wis. 263, 116 N. W. 641.

The last proposition is that parol evidence was not suffi-

cient to overcome the written evidence as to appellant's ownership, referring, obviously, to the certificate of stock and the records of the corporation as the written evidence. But the case on the part of respondent did not rest wholly upon parol evidence. There was the writing given by appellant to respondent and his associate, agreeing in these words: "If I sell my ten shares in the Herald-Press Publishing Company I will pay *Horal Nelson* and William F. Brandt the difference in value between one half and one third of the stock." True, looking at the language of the paper alone, it suggests, clearly, absolute ownership of the ten shares of stock by appellant. But the pledge to account for three and one-third shares, the amount in controversy here, evidences, very clearly, that the paper does not contain all the agreement between the parties with reference to the stock, and was not intended to. Why appellant so pledged himself does not appear in writing. No consideration is mentioned therein, though it would seem there probably was one. When, by aid of the parol evidence, we discover the whole contract, the ambiguity is explained. It thereby appears that the paper was intended to be the written evidence that appellant held three and one-third shares merely as trustee for the two persons he agreed to account to in accordance with the agreement to combine the printing establishments. It is also plainly seen that the words "my ten shares" merely refer to the status of the legal title. On the whole the evidence abundantly supports the finding of the court that the three and one-third shares, though carried on the books of the corporation in the name of appellant, were, as between him and respondent, the property of the latter.

By the Court.—The judgment is affirmed.

PHILLIPS, by guardian *ad litem*, Respondent, vs. EGGERT and others, Appellants.

January 12—January 31, 1911.

Sheriffs: Loss of attached property: Failure to regain possession: Negligence: Liability: Burden of proof: Removal of property to another state.

1. A sheriff who has property in his custody, pursuant to a levy thereon, is liable for its loss whenever caused by his failure to exercise reasonable care and diligence to preserve such custody or, in case of a loss of possession through any cause, to repossess himself thereof as provided by subd. 3, sec. 2749, Stats. (1898).
2. Whenever a sheriff sets up a justification for the release or loss of property taken on attachment, the burden is on him of showing that he has been relieved from the obligation of having the property forthcoming to answer the judgment.
3. Consent of plaintiff's attorney that the sheriff need not employ a custodian to take charge of a steamboat which he has attached, while lying at a wharf in the harbor, does not relieve him from the duty to do everything that reasonable care and diligence demand to repossess himself of the boat after it has cleared and passed out of his possession to other parts.
4. A sheriff who, after learning of the disappearance of a steamboat which he had attached, made no effort to ascertain its whereabouts or to recover it, although promptly notified by plaintiff's attorney that he would be held responsible for any judgment that might be recovered in the action, was guilty of negligence in that regard for which he and his bondsmen were answerable; and the fact that such steamboat cleared for a port in another state would not relieve them.
5. A sheriff has a special interest in property attached by him, which authorizes him to retake it or recover it in legal proceedings, even in a foreign jurisdiction, for the purpose of satisfying the demand of the attaching creditor.

APPEAL from a judgment of the circuit court for Manitowoc county: MARTIN L. LUECK, Judge. *Affirmed.*

September 28, 1906, the plaintiff brought suit against the Portage Transit Company, a foreign corporation, to recover

damages for personal injuries. A writ of attachment was issued out of the Brown county circuit court on the same day, and an *alias* writ, with the affidavit and undertaking required by law, was delivered to the sheriff of Manitowoc county for service. The bond of indemnity demanded by the sheriff was furnished and the writ was then served and an attachment made. The property attached was the steamship "Portage," then lying at the wharf in the harbor of the city of Manitowoc. No watchman or custodian was placed on the boat by the sheriff and no bond for the release of the boat was furnished by the defendant. The sheriff testified that when he spoke to plaintiff's counsel about putting a custodian in charge of the boat he was told that it would not be necessary. Clearance papers were obtained from the customhouse officer, and a few days after the service of the writ the boat left the harbor during the nighttime without the knowledge of the sheriff. On the morning of the day after the disappearance the sheriff learned of the boat's departure. It appears that the boat cleared for Duluth, Minnesota. Soon after learning that the boat had left the harbor the sheriff informed the attorney of the plaintiff at Green Bay of its disappearance. The attorney informed the sheriff that the plaintiff had no course to take but to hold the sheriff and his bondsmen for the plaintiff's damages in the event that the plaintiff recovered judgment against the defendant transit company. The attorney for the plaintiff also wrote the sheriff to the same effect. The sheriff on the day following the disappearance learned by inquiry from the customhouse officer that the boat had cleared for Duluth, Minnesota. He took no steps to regain possession of the boat.

On November 27, 1906, the plaintiff recovered judgment against the Portage Transit Company for $2,537.72 and costs. Execution issued on this judgment, which the sheriff of Manitowoc county returned showing that he was unable to find any property belonging to the defendant.

The plaintiff brought this action against the sheriff and his bondsmen to recover the amount of the judgment he held against the Portage Transit Company, on the ground that the boat which was attached in the action against the Portage Transit Company had been allowed to escape through the negligence of the sheriff, and on the ground that the sheriff had been negligent in not attempting to retake the boat after it had escaped.

The court instructed the jury in submitting the case as follows:

"The burden of proof is likewise upon the defendants to satisfy and convince you by a preponderance of the evidence that the defendant *Eggert* exercised due care and diligence to again possess himself of the boat."

The jury found that the sheriff was not guilty of negligence in losing possession of the boat, but that he was guilty of negligence in not repossessing himself of it.

This is an appeal from the judgment in plaintiff's favor entered upon the verdict.

For the appellants there was a brief by *Burke & Craite* and *Hougen & Brady,* and oral argument by *A. L. Hougen.*

For the respondent there was a brief by *M. E. Davis,* attorney, and *John E. Tracy,* of counsel, and oral argument by *Mr. Davis.*

SIEBECKER, J. There is no issue in the case as regards the issuance of an attachment and the levy made on the boat in pursuance thereto by the defendant *Eggert* as sheriff. The controversy arises respecting the sheriff's conduct as to the disappearance of the boat after having taken possession of it under his writ of attachment and in not repossessing himself thereof after such loss of possession. The rule is well established that a sheriff who has property in his custody, pursuant to a levy thereon, is liable for its loss whenever it is caused by his failure to exercise reasonable care and

diligence to preserve such custody (35 Cyc. 1668), and, in case of a loss of possession through any cause, it is his duty to exercise reasonable care and diligence to repossess himself thereof. Subd. 3, sec. 2749, Stats. (1898), provides:

"If any of the attached property belonging to the defendant shall have passed out of the hands of the sheriff without having been sold or converted into money such sheriff shall repossess himself of the same, and for that purpose shall have all the authority which he had to seize the same under the writ of attachment."

It is obvious from this provision that the duty devolves upon a sheriff having property in his official custody to repossess himself thereof whenever it shall have passed out of his hands, subject, of course, to the condition that he may release the property in the manner provided by law or with the consent of the attaching creditor. In the light of the foregoing statute the proposition is also reasonably clear that, when a sheriff avers a justification for the release or loss of property taken into his possession under an attachment, he assumes the burden of showing that he is relieved from the obligation of having the property forthcoming pursuant to the attachment. The court instructed the jury that under the facts and circumstances of the case the burden rested on the defendants to show that the sheriff exercised reasonable care and diligence to repossess himself of the boat. This instruction is assailed on the ground that it was error to so direct the jury, because the evidence shows, as the jury found, that the sheriff was not negligent in losing possession and custody of the boat held by him under the levy. The claim is that the sheriff acted under the direction of the plaintiff's attorney in not placing a custodian in charge of the boat, and hence that he was not responsible for its disappearance from the harbor under the circumstances shown. It must be assumed, under the verdict found, that the plaintiff's attorneys consented that the sheriff need not employ a custodian to take charge of the boat and that this exonerates him from the imputation of neg-

ligence in losing possession of the property. This phase of the case, however, does not embrace his whole duty in the matter, and there remains to be considered the question whether the sheriff fulfilled his legal duty to repossess himself of it under the statute declaring that, whenever property so held shall pass from the sheriff's hands, "he shall repossess himself of the same, and for that purpose shall have all the authority which he had to seize the same under the writ of attachment." It is manifest that the consent of the plaintiff's attorney that the sheriff need not employ a custodian to take charge of the boat while lying at the wharf in the harbor was not also a direction or understanding that the sheriff was not to take all the steps reasonably necessary to repossess himself of it after it cleared and passed out of his possession for other parts. The duty rested on the sheriff, on the morning after he learned of the boat's disappearance, to do everything that reasonable care and diligence demanded to repossess himself of the property.

Appellants aver that the sheriff did all that reasonable care and diligence required of him under the circumstances in the matter, and that the jury's finding that he was guilty of negligence in this regard is not supported by the evidence. We do not find this claim supported by the record. An examination of the evidence discloses that the sheriff did nothing to ascertain the whereabouts of the boat after learning of its disappearance from its place in the harbor. It appears that the boat cleared for Duluth, Minnesota. The sheriff admits that he made no attempt to find it there or to search for it at any other place. Does this conduct show that he performed his duty to have the property forthcoming in the attachment, and is it justifiable as an exercise of reasonable diligence to accomplish that end? We cannot perceive how the jury could have drawn the inference from the facts and circumstances that the sheriff acted with reasonable diligence to repossess himself of the boat, since he admittedly did prac-

tically nothing in this respect. Nor is the claim that the plaintiff's attorney acquiesced in his nonaction in this matter sustained by the record, for it affirmatively appears that the attorney at once informed him that the plaintiff would hold him responsible for the satisfaction of any damages he might recover in the action.

It is suggested that, since it appears that the boat passed beyond the confines of this state, the sheriff is relieved of the duty of pursuing and retaking it. We find no support for this claim. Under the circumstances shown, it has been held that a sheriff is obligated to use reasonable diligence to ascertain the whereabouts of the property and to follow it, and that his special interest therein, acquired by the levy, authorizes him to retake it or recover it in legal proceedings for the purpose of satisfying the demand of the attaching creditor. In some of the following cases such rights were upheld though the property had been taken into foreign jurisdictions, and the sheriff was held responsible as in other cases: *Rhoads v. Woods,* 41 Barb. 471; *Lovejoy v. Hutchins,* 23 Me. 272; *Newman v. Wilson,* 1 La. Ann. 48; *Ansonia B. & C. Co. v. Babbitt,* 74 N. Y. 395; *Lovell v. Sabin,* 15 N. H. 29; Drake, Attachment, § 291. We consider that the jury are supported in this finding; that the sheriff did not exercise reasonable diligence to repossess himself of the boat.

We find no error in the record. The court properly awarded judgment on the verdict.

By the Court.—Judgment affirmed.

SCHMIDT, Executrix, Respondent, vs. J. G. JOHNSON COMPANY, Appellant.

January 12—January 31, 1911.

Master and servant: Unsafe place: Giving way of wall: Presumption of improper construction: Injury to servant while making place safe: Assumption of risk: Contributory negligence: Warning of danger: Accident: Questions for jury.

1. The fact that the plank wall of a coal shed which had been built by defendant about a month before suddenly gave way and the top of the wall moved several feet and injured a servant who was engaged in bracing it, was sufficient, in the absence of any explanation, to warrant a finding by the jury that the wall was not properly constructed, to the knowledge of the defendant.
2. The mere fact that the servant, by direction of the defendant, was engaged in bracing the wall of the shed, which at the time was only half filled with coal, would not justify the court in holding as a matter of law that he was knowingly making a dangerous place safe and hence that he assumed the risk and that the rule requiring the master to furnish a reasonably safe working place did not apply. Many reasons beside the avoidance of present danger might exist for bracing the wall; and in the absence of anything appearing to the contrary the servant had the right to believe it safe.
3. Such a case does not fall within the principle that where work is of such a nature that its progress is constantly changing the conditions as regards increase or diminution of safety, the safe-place rule does not apply.
4. Where the servant in such case was not chargeable with notice of the dangerous condition of the wall, the fact that, in chopping off a knot from one of the bin posts for the purpose of fitting the brace thereto, he had placed himself on a ladder in the space between the wall and an independent post standing near,—that being the most convenient place for doing the work,—does not show that he was guilty of contributory negligence, although when the wall gave way he was crushed between it and said independent post.
5. The questions whether the servant had been warned of the danger before the wall gave way, and whether his injury was the result of an unaccountable accident or of the defective construction of the wall, are *held* upon the evidence to have been for the jury.

APPEAL from a judgment of the circuit court for Manitowoc county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

This action was brought by plaintiff as executrix to recover for personal injuries sustained by her late husband which resulted in his death. The principal issues involved on the trial were whether defendant furnished a reasonably safe working place, assumption of risk, contributory negligence, and amount of damages. The defendant objected to any evidence under the complaint, which objection was overruled. Motions were made by defendant for nonsuit and directed verdict, which were denied. The jury returned the following verdict:

"(1) Was the death of plaintiff's testator, John Schmidt, deceased, caused by his being pressed on June 11, 1908, between the west wall of the coal bin or shed and the post to the west thereof described in the complaint, when that wall moved or gave way to some extent, while he, as an employee of said defendant company, was doing the work which he was directed by the foreman to do? *A.* Yes.

"(2) At the time when said testator was injured, was the west wall of said shed or bin so weak and insufficient, for the purpose of holding the coal then stored therein, as to make the place in which plaintiff's testator was at work when he was injured not reasonably safe for performing there the work he was then doing? *A.* Yes.

"(3) If you answer the second question 'Yes,' answer this: Before said testator was injured, did the proper representative of defendant know that said place in which plaintiff's testator was at work when he was injured was not reasonably safe for the performance there of the work which he was then doing? *A.* Yes.

"(4) If you answer the second question 'Yes' and the third question 'No,' answer this: Would the exercise of ordinary care by defendant's said representative have made him aware of the fact, before said testator was injured and in time to have prevented the injury, that said place specified in the third question was not reasonably safe for the performance there of the aforesaid work? *A.* Yes.

"(5) If you answer the second question 'Yes,' and if you also answer 'Yes' to either the third or fourth question, an-

swer this: Was the testator's injury the natural and probable consequence of the defendant's negligence in not having provided a reasonably safe place for the testator in which to do the aforesaid work? *A.* Yes.

"(6) If you answer the fifth question 'Yes,' answer this: In the exercise of ordinary care, should defendant's said representative, as a man of ordinary intelligence and in the light of the attendant circumstances, reasonably have foreseen before said testator was injured, and in time to have prevented the injury, that the existing condition of the west wall of said shed or bin would be likely to cause personal injury to any of defendant's employees while engaged in doing the work which said testator was doing at the time of his injury? *A.* Yes.

"(7) If you answer the second question 'Yes,' answer this: Before he was injured, did said testator know that the place specified in the third question was not reasonably safe for the performance there of the aforesaid work? *A.* No.

"(8) If you answer the seventh question 'No,' answer this: Would the exercise of ordinary care by said testator have made him aware of the fact, before he was injured and in time to have prevented the injury, that said place specified in the third question was not reasonably safe for the performance there of the aforesaid work? *A.* No.

"(8½) Before his injury and while he was standing on the ladder, was said testator advised by Fred Krase to get off from the ladder because the west wall of the coal shed or bin was cracking? *A.* No.

"(8¾) If you answer 'Yes' to the question last above, answer this: In reply to the advice given by Fred Krase did the said testator say: 'It won't come so soon?' *A.* No.

"(9) Did any want of ordinary care on the part of said testator contribute to cause his injury? *A.* No.

"(10) What sum will reasonably compensate the estate of said testator for the pain and suffering which he experienced from his aforesaid injuries before his death, and for the expense of medical aid and attendance in the treatment of those injuries? *A.* $1,025.

"(11) What sum will fairly and justly compensate *Mary Schmidt,* the widow of said testator, for the pecuniary injury resulting to her from his death? *A.* $2,000."

The usual motions were made by defendant after verdict and denied, and judgment rendered in favor of the plaintiff, from which this appeal was taken.

For the appellant there was a brief by *Nash & Nash,* and oral argument by *A. L. Nash.*

For the respondent there was a brief signed by *O'Connor, Schmitz & Wild, Schmitz & Groelle,* and oral argument by *A. J. Schmitz.*

KERWIN, J. The questions raised by the various assignments of error may be classified under three heads: (1) Was there a failure to furnish a reasonably safe working place? (2) Did the decedent assume the risk and was he warned of the danger? (3) Was he otherwise guilty of contributory negligence?

A preliminary question is raised by appellant on an objection to evidence under the complaint on the ground that it failed to state a cause of action. The court below overruled the objection and we think no prejudicial error was committed in that regard.

1. Error is assigned because of refusal to grant a nonsuit. It is argued that plaintiff produced no proof to show any negligence in constructing or maintaining the wall which gave way and caused the injury, or any proof of actual defect in the wall. The evidence at the close of plaintiff's case showed that deceased was sixty-two years old when injured, was a brickmaker by trade, but had only worked at it four or five months in the year, and did not show the extent of his experience working around coal sheds or other similar structures. On the morning in question defendant's foreman ordered deceased and one Krieger to put braces on the west side of a hard-coal shed. This shed stood between the river and Quay street, the river being north of it and the street south. The west wall of the shed was about 105 feet long and the south wall 114 feet long. The west wall of the shed

was built by defendant in the spring of 1908 and had been finished about a month at the time of the injury, June 11, 1908. The top of the wall, which was nineteen or twenty feet high, slanted in, and was about two feet farther east at the top than at the bottom. The wall consisted of bin posts set in the ground and three-inch planks spiked on the inner surface thereof. The bin was about half filled with coal when deceased and Krieger, at the time of the injury, were at work on it putting up braces. The day before they had worked putting up braces on the south wall. On the day in question the deceased and Krieger, by instruction of defendant's foreman, began bracing at the middle of the west wall. They set a brace against the bin post; another post standing straight, the foot of which was in line with the bin post but about twelve inches north; the top of the bin post, owing to the slant, was about two feet east of the straight post. There was a knot on the west surface of the bin post which interfered with the brace, and deceased put up a ladder, one rail of it resting against the bin post and the other against the straight post, and went upon it, his right foot resting on the round next to the top and his left foot between the ladder and the planking of the wall, facing south, and chopped off the knot. Deceased then took hold of the brace to adjust it, his body being between the straight post and the planking east of it, a space of about a foot. Then came a crash. Krieger, who was at the bottom of the brace, jumped back, then looked at deceased, who was at the top of the ladder holding on the top of the brace and crying out. The top of the wall had come out, both posts had shifted, but the ladder still stood. The top of the wall had moved about four feet and the straight post moved west some, the space between the wall and the straight post being narrowed from a foot to about seven inches. The deceased was removed to the hospital and later died. One of plaintiff's witnesses testified that he did not see anything wrong with the wall before the crash; that

it looked good to him; that the ladder was nine feet high and the knot twelve feet from the ground.

A motion for a nonsuit was made based upon the contentions that plaintiff failed to prove negligence in constructing or maintaining the wall, or knowledge of defect, if any existed; that plaintiff's proof showed that deceased was engaged in making safe an unsafe place; and that he was guilty of contributory negligence. We do not think any of these contentions tenable, therefore the nonsuit was properly denied. In making her case plaintiff was not called upon to prove defects in the wall. The fact that it was constructed by defendant only a short time before the injury and gave way in the manner shown by the evidence was sufficient to warrant the jury in finding that it was not properly constructed, to the knowledge of defendant, in the absence of any showing as to cause of the movement. *Montanye v. Northern E. Mfg. Co.* 127 Wis. 22, 105 N. W. 1043; *Lipsky v. C. Reiss C. Co.* 136 Wis. 307, 117 N. W. 803; *Mulcairns v. Janesville,* 67 Wis. 24, 29 N. W. 565; *Parker v. Fairbanks-Morse Mfg. Co.* 130 Wis. 525, 110 N. W. 409; *Mueller v. Northwestern I. Co.* 125 Wis. 326, 104 N. W. 67. The foregoing cases and many others in this court clearly show that negligence was inferable from the facts proved. In *Mulcairns v. Janesville, supra,* a wall fell and the unexplainable falling was admitted in the answer, and it was held that the falling was *prima facie* evidence of negligence. The court said:

"If it had been properly constructed, it is common observation and within the common course of things that it would not have fallen; therefore it was not properly constructed; and it was negligently constructed, because, by the exercise of ordinary care and prudence, such a wall would have been so constructed that it would not have fallen, but would have stood alone. The city, in such a case, may well be called upon to explain the reason why; for the knowledge of the manner of the construction of its work is peculiarly in the city and its agent, for they constructed the wall. The city

must, by proof, repel and overcome this natural presumption."

It is further argued under this head that the deceased at the time of the injury was engaged in making a dangerous place safe, therefore the general rule that the master must furnish a reasonably safe place does not apply. This contention cannot be sustained, because the evidence was not sufficient to warrant the court in taking this question from the jury. Counsel do not even admit that the place was unsafe. In their brief they say: "Of course the defendant does not admit that the place was dangerous to the extent that would charge the defendant with lack of ordinary care if no further bracing had been ordered." But they say that when the defendant ordered braces placed it was notice to deceased. The purpose of the bracing was subject to explanation. In fact the shed was only half filled with coal at the time of the injury, and the state of the evidence at the close of plaintiff's case was clearly not such as to justify the court in holding as matter of law that deceased was knowingly making a dangerous place safe, so he did not assume the risk, nor was defendant relieved from the duty of furnishing a reasonably safe place. A great many authorities are cited by counsel for appellant on this point from this court and others, but we do not regard them controlling in this case. Of course, if deceased could be charged with knowledge as matter of law that the place was unsafe, then the cases cited by counsel would be pertinent, but we do not think the evidence will bear such construction. We refer to a few of the cases cited by appellant by way of illustration. For example, in *Mielke v. C. & N. W. R. Co.* 103 Wis. 1, 79 N. W. 22, the danger was known to the plaintiff, and it did not appear that the foreman of defendant had or could have secured, by the use of ordinary care, any knowledge superior to that of the plaintiff as to the particular danger; besides, it appeared that the plaintiff knew the danger. In *Peschel v. C., M. & St. P. R. Co.* 62

Wis. 338, 21 N. W. 269, recently considered by this court in *McKillop v. Superior S. Co.* 143 Wis. 454, 127 N. W. 1053, the question involved was negligence of a fellow-servant and knowledge of the danger. In *Porter v. Silver Creek & M. C. Co.* 84 Wis. 418, 54 N. W. 1019, it was held that the danger to the plaintiff was one which defendant could not reasonably have anticipated, and that the negligence, if any, causing the injury was that of a fellow-servant. *Liermann v. Milwaukee D. D. Co.* 110 Wis. 599, 86 N. W. 182, turns on the point that the negligence was that of a fellow-servant, the risk of which was assumed by deceased. *Larsson v. McClure,* 95 Wis. 533, 70 N. W. 662, turned upon the proposition of assumption of the ordinary risks of the employment, where the risk is obvious and open to the observation of all. To the same effect is *Walaszewski v. Schoknecht,* 127 Wis. 376, 106 N. W. 1070.

Nor does the instant case fall within the principle cited to our attention by counsel for appellant to the effect that, where the work is of such a nature that its progress is constantly changing the conditions as regards increase or diminution of safety, the safe-place rule does not apply. The deceased here was at work in bracing a wall which he had a right to believe, in the absence of anything appearing to the contrary, was safe. It is obvious, under the circumstances of this case, that many reasons might exist for putting up the braces besides the avoidance of present danger. Moreover, this was made more apparent from evidence introduced after nonsuit was denied. The evidence when plaintiff rested was far from being sufficient to charge deceased with knowledge of present danger or that the place was unsafe. There is no question here of the negligence of a fellow-servant. The evidence was ample to entitle the jury to find that the wall gave way because of improper construction, and the deceased had a right to rely upon proper construction in the absence of warning.

It is further contended that at the close of plaintiff's case the evidence showed that deceased was guilty of negligence directly contributing to the injury. This claim is based upon the position in which he voluntarily placed himself on the ladder between the wall and the straight post at the time of the injury, the injury, as it seems, being caused by the closing of the space where he stood between the post and the wall to seven inches. If he was not chargeable with knowledge of the unsafety of the place he was not negligent in going upon the ladder where he did, if that was the most convenient place to do the work. Deceased was a right-handed chopper. He could not do the work conveniently, if at all, from the other side, because he would have to use the axe with his left hand, so he had good reason for placing the ladder in the position in which it was when the wall gave way and crushed him. If there was evidence that he saw signs of danger and then put himself in the place of danger, the situation would be quite different, as is apparent from several cases cited by counsel for appellant, notably *Naylor v. C. & N. W. R. Co.* 53 Wis. 661, 11 N. W. 24, and *Johnson v. Ashland W. Co.* 77 Wis. 51, 45 N. W. 807.

2. Error is assigned because the court refused to direct a verdict for the defendant. What has been said on refusal to grant the motion for nonsuit applies here and need not be repeated. But in addition to the grounds urged in favor of a nonsuit it is claimed that at the close of all the evidence it appeared that deceased was warned of the danger, and that the injury was the result of an accident occurring unexpectedly and unaccountably. At the close of the evidence the case was stronger against the defendant than when the motion for nonsuit was made, aside from the question of warning. For example, there was evidence that the defects were not obvious, and a witness on the part of the plaintiff who was a coal-dock builder testified on rebuttal that the wall was not reasonably safe. The appellant relies strongly upon the

point that the deceased was warned and claims that the evidence is undisputed on that question. The deposition of one Krase, taken in California, is relied upon as establishing conclusively that deceased was warned of the danger. It appears from the record that there was no cross-examination of the witness Krase, nor any appearance on his examination on behalf of plaintiff. He testified substantially that he resided in California, but that on the day of the injury and for nine years prior thereto he resided in Manitowoc, Wisconsin; that he was in a blacksmith shop about fifty feet west of the coal shed where deceased was at work on the ladder; that he went east to a point ten feet from deceased and said to him, "John, get off from that ladder, it's cracking, it's coming sure. When I said 'it's cracking, it's coming sure,' I referred to the wall of the coal bin; it was coming out; it was coming towards him. He says, 'It won't come so soon.'" The witness further testified that he heard the cracking of the coal bin; that after the conversation he went to the lime shed, about 350 feet south of the place where deceased was working, and was there about ten minutes before the injury occurred; that he departed for California in November following the injury.

Considerable evidence was offered by respondent throwing discredit upon the evidence of the witness Krase. It was shown that Krieger, who was helping deceased, was with him during the morning except for a period of two minutes, and that he must have seen Krase if he came where he said he did, to a point about ten feet from deceased, unless Krase came during the two minutes, and even then that it was almost certain that Krieger would have seen him because of the course taken by Krase in going from the blacksmith shop to the point where he said he was, thence south to the lime shed. The evidence of Krase is disputed as to the location of the blacksmith shop with reference to the coal shed, there being evidence tending to show that the blacksmith shop was sev-

enty-five feet west and fifty feet south of where deceased was when injured; so Krase would have to travel fifty feet north and seventy-five east, or a trifle less by cutting corners, to get to the point described by him when he said he gave the warning. Krieger was with deceased all of the time, except while he went to the southwest corner of the shed, between fifty and sixty feet and then about fifty feet east. It seems very improbable that Krieger would not have seen Krase had he given the warning as related. Moreover, Krieger did not hear the first crash spoken of by Krase, nor did a witness Miller who was at the northwest corner of the shed in a position to hear. Neither Krieger, Miller, nor any one else saw Krase on the premises when he says he was there, or heard but one crack. It also seems improbable that deceased would have remained on the ladder if Krase notified him, as he said he did, and under the circumstances, because Krase says when he warned him and the first crack came the wall was coming out, but it did not come out so as to injure deceased until several minutes—ten minutes Krase says—afterwards. Now if there was a crack and the wall began to come out, naturally and ordinarily a prudent man would get out of danger's way at once, and would not remain in such peril for a period of ten minutes and until he was crushed. So upon all the evidence we are of opinion that whether warning was given as testified to by Krase was a jury question.

On the point as to whether the injury was the result of an accident the evidence is ample to support a finding that it was not, but was caused by defective construction. We shall not extend this opinion by a review of the evidence on the point. The cases cited by appellant on this subject are based upon facts quite different from the facts in the case now before us. In *Schultz v. C. & N. W. R. Co.* 67 Wis. 616, 31 N. W. 321, where a piece of coal fell from a tender on which it was heaped up above its top and injured a trackwalker, it was held that if such method of loading was negligent, yet the

plaintiff, having knowledge thereof, assumed the risk as one incident to his employment. On the question of accident the court said that such an accident had never happened before from such a cause; that it was a very strange and almost unaccountable accident; that it was common and might be necessary to load the tender in that way. The case has little bearing upon the instant case. The same may be said of *Sorenson v. Menasha P. & P. Co.* 56 Wis. 338, 14 N. W. 446; *Morrison v. Phillips & C. C. Co.* 44 Wis. 405; and *Steffen v. C. & N. W. R. Co.* 46 Wis. 259, 50 N. W. 348.

As said in the case last above cited, "The nature of the injury may indeed, in some cases, raise a presumption of negligence." So in the instant case the moving and breaking of the wall raised a presumption that it was not properly constructed. *Hupfer v. Nat. D. Co.* 119 Wis. 417, 96 N. W. 809. Other errors assigned we do not regard of sufficient importance to require treatment. We find no reversible error in the record.

By the Court.—The judgment is affirmed.

LOVELAND, Trustee, Appellant, vs. LONGHENRY and others, Respondents.

January 12—January 31, 1911.

Mining leases: Construction: Conditions: Breach: Forfeiture: Dispute as to lands covered: Judgment: Effect.

1. Mining leases form a distinct class of instruments, creating special and peculiar legal relations and legal rights.
2. Where a mining lease, granted in consideration of the rents, covenants, and conditions therein agreed to be paid, kept, and performed by the lessee, fixes no time for its expiration and no day for the payment of rents and contains no express provisions for forfeiture, but requires the lessee to prospect the leased lands, to work, develop, and operate any mine or mines

discovered thereon, and to pay as rent one tenth part of the value of all ores and minerals discovered and mined, the covenant to prospect the land will be held to be a condition, upon breach of which the lessor may declare the lease at an end and enter upon and repossess himself of the land.

3. Such covenant and condition requires diligent and fairly continuous prospecting and search for a mine, so that the landowner will receive something for his land.
4. Where the lessee under such a lease, without having discovered a mine, discontinued prospecting operations on September 1, 1907, and had carried on no further work thereon up to November 13, 1908, this was a sufficient breach of the condition to authorize the lessor to terminate the lease by notice and entry.
5. Such delay and suspension of operations was for an unreasonable time; and it is not sufficient excuse therefor that the lessee was without means to carry on the prospecting work.
6. After forfeiture for breach of condition is complete, the lessor may, without waiving such forfeiture or breach, offer to allow the lessee to retain part of the leased premises on condition that he will acquiesce in the forfeiture as to the remainder.
7. Where, in an attempt to settle a controversy with respect to title between a tenant in possession and a lessor, a new lease is executed, and such new lease covers only part of the lands in controversy, and the parties cannot agree as to what was intended to be covered thereby, but both stand upon their rights at law, without seeking reformation, and both claim rights under the new lease as to the lands actually covered thereby, the lands not covered by the new lease must stand upon the former title, lease, or license, which will not be deemed to have been displaced by the execution of such new lease as to any tract not included therein.

APPEAL from a judgment of the circuit court for Grant county: GEORGE CLEMENTSON, Circuit Judge. *Modified and affirmed.*

Action by a lessee to enjoin repeated and continuous trespass on its leasehold by the landlord and those claiming under him. Defense that the lease was terminated by forfeiture. The appeal is from a judgment dismissing the complaint.

For the appellant there was a brief by *Richmond, Jackman & Swansen,* attorneys, and *T. L. Cleary,* of counsel, and oral argument by *S. T. Swansen.* They cited *Ganter v. Atkin-*

son, 35 Wis. 48; *Rowlands v. Voechting,* 115 Wis. 352, 91 N. W. 990; *Horner v. C., M. & St. P. R. Co.* 38 Wis. 165; *Bogie v. Bogie,* 41 Wis. 209; *Bergland v. Frawley,* 72 Wis. 559, 40 N. W. 372; *Hartung v. Witte,* 59 Wis. 285, 18 N. W. 175; *Behling v. N. W. Nat. L. Ins. Co.* 117 Wis. 24, 93 N. W. 800; *Drew v. Baldwin,* 48 Wis. 529, 4 N. W. 576; *Sunday Lake M. Co. v. Wakefield,* 72 Wis. 204, 39 N. W. 136; *Hummer v. McGee,* 141 Wis. 216, 124 N. W. 302; *Sobey v. Thomas,* 39 Wis. 317; *Raisbeck v. Anthony,* 73 Wis. 572, 41 N. W. 72; *St. Anthony M. & M. Co. v. Shaffra,* 138 Wis. 507, 120 N. W. 238; *Tipping v. Robbins,* 71 Wis. 507 37 N. W. 427; White, Mines & Min. Rem. §§ 134, 123, 125 87, 249, 250, 253, 263, 251, 244; and other authorities.

For the respondents there was a brief by *Kopp & Brunckhorst* and *Thomas & Hackney,* and oral argument by *Thomas Hackney* and *L. A. Brunckhorst.* They cited and relied upon many of the foregoing cases; also *Maginnis v. Knickerbocker I. Co.* 112 Wis. 385, 88 N. W. 300; *Glocke v. Glocke,* 113 Wis. 303, 89 N. W. 118; *Western L. & C. Co. v. Copper River L. Co.* 138 Wis. 404, 120 N. W. 277; *Hicks v. Smith,* 77 Wis. 146, 46 N. W. 133; *Peshtigo L. Co. v. Ellis,* 122 Wis. 433, 100 N. W. 834; *Wanner v. Wanner,* 115 Wis. 196, 91 N. W. 671; *Burgson v. Jacobson,* 124 Wis. 295, 102 N. W. 563; *Brown v. Kayser,* 60 Wis. 1, 8; and other cases and authorities.

TIMLIN, J. The defendant *Longhenry* is the owner in fee of several adjoining tracts of mineral-bearing land, and on December 6, 1906, executed and delivered to the Grant County Mining Company an instrument in writing by the terms of which, "in consideration of the rents, covenants, and conditions herein agreed to be paid, kept, and performed by the party of the second part," he leased and let for mining purposes three parcels or tracts of this land. To the first described parcel, viz. lot 32, he had no title, and it was prob-

ably inserted in the lease by mistake. The second parcel is part of lot No. 37, and the third parcel is part of a tract which we may designate and which was known as the "Nagel tract." The instrument further provided that the lessee should "commence operations on said premises on or before the first day of July, 1907, and thereafter is to prospect said lands and work, develop, and operate any mine or mines discovered on said land in a good, reasonable, and minerlike manner for at least nine months in each and every year, subject, however, to strikes, delays of carriers, and breakages of machinery and other causes beyond the control of the second party." The lessor retained surface rights except such as would be necessary for sinking shafts, equipping machinery, and raising ore. Provision for payment was as follows:

"The party of the second part agrees to and with the party of the first part to pay him as rents and tributes for the uses, rights, and privileges hereby given one tenth part of the value at the railroad of all lead, drybone, zinc, and other ores and minerals discovered and mined in and upon said premises."

It is noticeable that the lease fixed no time for its expiration, fixed no day for the payment of rents or tributes, and contained no express provisions for forfeiture.

Sec. 1647, Stats. (1898), reads:

"Where there is no contract between the parties or terms established by the landlord to the contrary the following rules and regulations shall be applied to mining contracts and leases for the digging of ores and minerals."

Then follow certain rules and regulations which may or may not be of great importance, depending upon whether or not the proofs bring the undisclosed titles within one or the other of the two cases mentioned in the statute above quoted. It appears very clearly that prior to the execution of the written lease in question the mining company and its grantors or assignors were occupying these *Longhenry* lands under other licenses or leases, oral or written. The terms and con-

ditions of these leases or licenses are not all in evidence. We cannot ascertain whether they were one or several, nor, if several, what lands were covered by each. These things are essential because of the statute above quoted and because it seems that a discovery was made on lot 34, but whether there was a separate license or lease on that lot, or whether it was included with others, cannot be ascertained from the evidence. There is no evidence of mining customs, so that it is impossible to say whether the mining company is entitled to hold lot 34 under the statute, or how much more if any more, nor, if there was a lease or license, what were its terms or conditions as to all the lands not covered by the written lease in question. It appears that the written lease in question was given and received in an attempt to settle a previously existing controversy between the parties. There is no attempt at reformation. The parties do not agree with reference to what other land the written lease in question was intended to cover. But it is undisputed that it was intended to cover lot 37 and the Nagel tract. It is admitted that it fails to conform to the intention of the parties, but what was this intention is not clearly shown, so that the elder claim, right, or title, whatever it was, to all lands not described in the written lease was not displaced by this written lease. All this is obvious and undisputed. The learned circuit court no doubt observed this, but considered it immaterial because the defendant *Longhenry* at the trial took the ground that he would not exact a forfeiture of lot 34, which lies north of Grant street, nor of any land north of Grant street, which also includes all the land from which any rent or tribute was ever due and several parcels of land not covered but intended to be covered by the written lease. It is, however, highly important that the rights of the parties be not concluded by the decree herein as to any lands or titles not actually covered by the written lease, because these rights have not been adequately presented on either side. *Longhenry* does not appeal

from the decree, so that the release or waiver of forfeiture of part of the land covered by the written lease in question, not being injurious to the appellant, should not be disturbed unless such release operated to waive the forfeiture as to all the land so covered. *Longhenry* in his notice of declaration of intention to consider the lease at an end which he served on the mining company November 13, 1908, includes other lands not held of him by the mining company under the written lease in question and north and south of Grant street, but as to all such lands not included in the written lease in question the notice must be deemed ineffectual because there is no proof of the terms on which other lands were held, no proof that such terms were breached, and no evidence on which the forfeiture could be upheld, and because the notice of forfeiture relates specially to the written lease and its stipulations. For these reasons it seems best that the decree of the court below be confined to its effect upon the rights of the parties arising out of their written lease of December 6, 1906. The decree below must be limited accordingly, and thus the decree would leave the written lease in question forfeited as to all lands therein described and lying south of Grant street, and in force as to all lands north of Grant street and actually described in the written lease. More specifically the appellant has lost by the decree below all that part of the Nagel tract lying south of Grant street extended.

With reference to the land covered by the written lease the circuit court found on sufficient evidence that the Grant County Mining Company, after entering and beginning work under the written lease in question, discontinued mining operations on or about September 1, 1907, and carried on no further work of this kind until November 14, 1908; "that the delay and neglect to prospect said lands and work, develop, and operate any mine or mines discovered thereon was not caused by strikes, delays of carriers, breakages of machinery, or any other causes beyond the control of the Grant

County Mining Company; that said Grant County Mining Company did not prospect said lands and work, develop, and operate any mine or mines discovered on said premises in a good, reasonable, and minerlike manner or as provided in said lease." The evidence shows beyond dispute that no mine and no "crevice or range" containing ore was discovered on the lands included in the written lease in question. There is no proof of the usages of miners. After or at the time of serving his notice of forfeiture *Longhenry* authorized the defendant *Wisconsin Zinc Company* and its employee *Thorne* to prospect for ore on that part of the Nagel tract covered by the written lease in question, and the Grant County Mining Company brought this suit for an injunction against *Longhenry,* the *Wisconsin Zinc Company,* and *Thorne* to restrain repeated and continuous trespasses in so doing. While the suit was pending the Grant County Mining Company became bankrupt and the action is now prosecuted by its assignee in bankruptcy. The circuit court denied any relief to the plaintiff and dismissed its complaint.

We may leave out of consideration the failure to pay rent or tribute on ore mined because there was no ore mined on any land covered by the written lease in question. We may also leave out of consideration any failure to "work, develop, and operate any mine or mines discovered on said land in a good, reasonable, and minerlike manner for at least nine months in each and every year," because there was no mine discovered on any land covered by said written lease. This leaves the only default of the plaintiff to consist of suspending prospecting operations on said land from September 1, 1907, to November 14, 1908. The lease is expressly given in consideration of the rents to be received and the covenants and conditions to be performed by the lessee. No rent would ever become due if no ore was discovered and mined. No ore would be discovered without prospecting. One of the stipulations of the lease, going to the whole consideration and de-

scribed therein as a covenant and condition, was that the lessee should after July 1, 1907, prospect the lands. This meant diligent and fairly continuous prospecting and search for a mine so that the landowner would receive something for his land. While analogies arising from urban or agricultural leases are not to be wholly rejected, it must be remembered that these mining leases form a distinct class of instruments, creating special and peculiar legal relations and legal rights. In *Maxwell v. Todd,* 112 N. C. 677, 16 S. E. 926, the mining lease had a fixed term of ninety-nine years, but otherwise it was very similar in terms to the lease in the instant case. The court, noticing that there was in the lease no stipulation for forfeiture for failure to open and work the mines, held that the construction which the law put on the lease would be the same as if such stipulation had been expressly written therein. The contrary construction would prevent the lessor from getting his tolls under the express covenant to pay the same and at the same time deprive him of all opportunity to work the mine himself or lease it to others. In *Starn v. Huffman,* 62 W. Va. 422, 59 S. E. 179, there was a mining lease from Starn to Huffman for one year and as much longer as Huffman should continue to work the mine, the lessee to pay ten cents per ton for all coal mined and begin mining coal on or before December 19, 1902, and pay for said coal every thirty days. There was nothing in the form of a condition and no express stipulation for forfeiture. Nothing was done under the lease, and it was held that this called for a termination of the lease. Many cases are collected and reviewed in the opinion of the court. See, also, *Shenandoah L. & A. C. Co. v. Hise,* 92 Va. 238, 23 S. E. 303; *Western Pa. G. Co. v. George,* 161 Pa. St. 47, 28 Atl. 1004; *Woodward v. Mitchell,* 140 Ind. 406, 39 N. E. 437; *Huggins v. Daley,* 99 Fed. 606, 48 L. R. A. 320; 20 Am. & Eng. Ency. of Law (2d ed.) 779, 780, 781; 26 Cyc. 708, 709, and cases.

In *Island C. Co. v. Combs,* 152 Ind. 379, 53 N. E. 452, it is said:

"In leases of mineral lands, of the nature of the one in question; where the lessee agrees to pay to the lessor a royalty or rent, which depends on the amount of coal or other product mined, the lessee thereby, in the absence of any provision to the contrary, impliedly obligates himself to begin the development of the coal, and the mining thereof, within a reasonable time after the execution of the lease. As to what may be regarded as a reasonable time, however, depends upon the circumstances of the particular case."

The application of a cognate principle is discernible in *Western L. & C. Co. v. Copper River L. Co.* 138 Wis. 404, 120 N. W. 277. *Horner v. C., M. & St. P. R. Co.* 38 Wis. 165, contains these words:

"(1) Although there are technical words, which, if used in a conveyance, unmistakably create a condition, yet the use thereof is not absolutely essential to that end, and a valid condition may be expressed without employing those words. (2) It is not essential to a valid condition that, in case of a breach thereof, a right of re-entry be expressly reserved in the deed, or that it be expressed therein that the estate of the grantee shall terminate with a breach of the condition."

Applying these abstract rules we say in the instant case: Where a mining lease is granted upon the consideration that the lessee shall observe the covenants and conditions thereof, and the lessee covenants to prospect the land and in case he discovers a mine pay the lessor rent, royalty, or tribute based upon the ore mined from such mine if discovered, the covenant to prospect the mine is in the nature of a condition and the lessee must proceed with and persist in prospecting with reasonable diligence and continuity of effort. Was the delay of the lessee in the instant case unreasonable? In *Norway v. Rowe.* 19 Ves. Jr. 144, it was averred in the bill, and apparently assumed to be correct by the court and counsel, that by the custom of Cornwall suspension of operations by pros-

pectors or adventurers for a year and a day was ground for forfeiture of their interest in the mineral land. McSwinney accepts this as proof of the custom of Cornwall in his excellent treatise on Mines. In this age and country of greater hurry and activity the limit of suspension of prospecting should without sufficient excuse certainly not exceed that. The finding of the learned circuit court, whose circuit includes the most ancient and active mining district in this state, also supports the conclusion that the delay in the instant case was unreasonable. We are, aside from authority and foreign customs, disposed to agree with this determination. We find no sufficient excuse for the delay in the fact that the lessee was without means to carry on the prospecting work.

The only remaining question is whether the forfeiture which resulted from failure to persist in prospecting with reasonable diligence and continuity was waived as to that part of the Nagel tract south of Grant street because the lessor did not insist on a forfeiture of all the land covered by the written lease in question. The alleged waiver consists of a paragraph in the answer of defendants as follows: "That the defendant *Martin Longhenry* is still willing to make, execute, and deliver to the plaintiff a new mining lease to the northerly part of said premises so as not to interfere in any manner or form with the plaintiff's enjoyment of its mining lease," together with some evidence of conversations between lessor and agents of lessee. This unusual averment in the answer seems to be put forward as a sort of consolation to the lessee for the forfeiture declared by *Longhenry*—a salve for the wounded conscience of the lessor, or a modified form of donation for expiation not unknown in history or in our day. The legal guilt of the lessor cannot logically be inferred from such act, because it is often prompted by tenderness rather than a sense of wrongdoing. No doubt this could not be done against the will of the lessee in an ordinary lease bind-

ing the lessee to payments or other obligations which he might not be willing to assume as to part of the demised premises. But even then it could be done by consent of parties. In a mining lease this offer, after a forfeiture is complete, to waive the forfeiture as to part of the premises seeks to impose no obligation or duty upon the lessee, but merely to give him the option to hold the remainder of the demised tract and prospect it if he chose or abandon it without expense or liability. This offer by the lessor is made after a forfeiture is incurred and declared, and was in effect, as the evidence here shows, conditioned upon the lessee acquiescing in the forfeiture and accepting back under his lease a part of his former leasehold. The evidence on this point is not in conflict, and the finding is that the lessor waived his right to insist on a forfeiture as to the lots covered by the lease and intended to be covered thereby lying north of Grant street. So far as this relates to lands "intended to be covered," these were apparently the most valuable lands of the lessee, on which it had done most of its work and made some apparent discoveries and which it held under some other license or lease. The other lands must be considered as covered by a conditional offer to waive the forfeiture, which the lessee did not accept, but which was carried forward into the litigation, wherein the trial court upheld the forfeiture but took the lessor at his offer and decreed the forfeiture waived as to lands north of Grant street. This was probably error, because it gave the lessee the benefit of the waiver without consenting to the condition of his acquiescing in the forfeiture as to the remainder of the tract, but it was error of which the lessee cannot complain, and the lessor has not appealed.

The decree of the court below must be so modified as to exclude from its confirmation of forfeiture all lands not described in the written lease of December 6, 1906, and as so modified affirmed.

By the Court.—Judgment modified and affirmed, with costs.

YOUNG and wife, Appellants, vs. MINER and others, Respondents.

January 12—January 31, 1911.

Mortgages: Redemption: Parties.

Where, after the giving of a deed which, though absolute in form, is claimed to have been merely a mortgage, the grantor conveyed all his interest in the land to a third person, such grantor is not a necessary or proper party to an action by the second grantee to redeem from the alleged mortgage.

APPEAL from a judgment of the circuit court for Richland county: GEORGE CLEMENTSON, Circuit Judge. *Reversed.*

William Young in his lifetime was the owner of the southeast quarter of the northeast quarter and the northeast quarter of the southeast quarter and the south half of the southeast quarter of section 21, township 10 north, of range 1 west. In 1885 he mortgaged said premises to one J. W. Lybrand. In 1891 he died leaving a widow and several heirs. All of the heirs united in a deed of the premises to *Jesse Young,* who executed a new mortgage to Lybrand for $650, being the balance due on the old mortgage together with some advances made to pay off some of the heirs. *Jesse Young* in turn deeded the south half of the southeast quarter to Jacob and Albert Young, subject to the mortgage. Jacob and Albert Young were the plaintiffs in the case of *Young v. Miner,* reported in 141 Wis. 501, 124 N. W. 660. At the time Jacob and Albert brought their action, *Jesse Young* and *Leona Young,* his wife, brought the action we have presently under consideration, seeking the same kind of relief as to the parcels of land which they claimed to own. Both cases were tried together and were decided at the same time, but the appeal in the present action was not taken until after the record in the other case was returned from this court. All other facts essential to an understanding of the questions raised on this appeal will be found in the statement of facts in *Young v. Miner, supra.*

A. C. Vaughan, for the appellants.
L. H. Bancroft, for the respondents.

BARNES, J. The appellants contend that under the decision in *Young v. Miner,* 141 Wis. 501, 124 N. W. 660, referred to in the statement of facts, the judgment in this action must be reversed. The respondents insist that Jasper Haller was a necessary and indispensable party to the action, without whose presence judgment could not be rendered in plaintiffs' favor, and that the judgment therefore was right.

If Jacob and Albert Young did not convey to Lybrand all their interest in the south eighty-acre tract by the deed executed February 25, 1899, then Haller did not convey all of his interest in the north eighty-acre tract by his deed to Lybrand executed on the same day. Both deeds were given to the mortgagee at the same time and under the same circumstances and as part of the same transaction, and the evidence so far given shows that, if one of the grantors has the right to have his deed in effect declared a mortgage, all have. Before this action was tried Haller conveyed his interest in the premises to the plaintiff *Jesse Young.* If that interest was an equity of redemption it might be conveyed. The plaintiffs are standing on that conveyance, and must stand on it, because if Haller parted with his equity of redemption it is manifest that the plaintiffs have no cause of action. This being the situation, it is not apparent how Haller is a necessary or even a proper party to the action. For the reasons stated in *Young v. Miner, supra,* the judgment must be reversed.

By the Court.—Judgment reversed, and cause remanded for a new trial.

MISHAWAKA WOOLEN MANUFACTURING COMPANY, Appellant, vs. TEASDALE, Assignee, Respondent.

January 13—January 31, 1911.

Void conditional sale: Rights of assignee for benefit of creditors: Bankruptcy: State statutes: Federal courts.

1. **Where a contract of conditional sale of goods by which the vendor retains title is void under sec. 2317, Stats. (1898), as to the creditors of the vendee, it is void as to his assignee for the benefit of creditors under sec. 1693c, Stats. (Supp. 1906: Laws of 1901, ch. 207), and such assignee is entitled to possession of the property as against the vendor.**
2. **Although the federal rule, when unaffected by statute, is that a trustee in bankruptcy takes only the title and rights of the bankrupt, yet where by state law a transfer or incumbrance is void as to the creditors the trustee succeeds to the rights of any creditor qualified to avoid such transfer or incumbrance, the federal courts being controlled in such cases by the state statute and the interpretation given it by the highest court of the state, unless affected by the peculiar provisions of the bankruptcy act itself.**

APPEAL from an order of the circuit court for Monroe county: E. C. HIGBEE, Circuit Judge. *Affirmed.*

One J. C. Mullen, a merchant of Sparta, Wisconsin, purchased and received some goods from the plaintiff under a written contract wherein it was provided that "the title and property of all the goods herein mentioned shall remain in the vendor until fully paid for in cash, and if payment for the same shall not be properly made when due, or if, at any time before the same shall be fully paid for, the purchaser shall become insolvent, or shall in the opinion of the vendor be in danger of insolvency, or the vendor, in its judgment, shall for any reason whatever deem itself in danger of losing the price of said goods, then the vendor may, at its option, reclaim and take possession of so much of the said goods as shall then remain in the hands of the purchaser unsold."

The contract was never filed as provided by sec. 2317, Stats. (1898). After some of the goods so purchased and received were sold, Mullen made a voluntary assignment, for the benefit of creditors, to the defendant. Plaintiff brings replevin for the unsold goods in the possession of the defendant, alleging that no part of the purchase price has been paid and setting out the above facts, in addition to the usual averments in such an action. The defendant interposed a general demurrer, and plaintiff appealed from an order sustaining the same.

For the appellant there was a brief by *Buell & Lucas,* and oral argument by *C. E. Buell.* They contended that at common law an assignee for the benefit of creditors represents the assignor only. He does not represent the creditors except as he is made to represent them by statute. *Hawks v. Pritzlaff,* 51 Wis. 160; *Estabrook v. Messersmith,* 18 Wis. 545; *Keyes v. Merrill F. Co.* 92 Wis. 32; *Skobis v. Ferge,* 102 Wis. 122. We have no statute making the assignee the representative of creditors except sec. 1693*c,* Stats. (Supp. 1906: Laws of 1901, ch. 207), which only authorizes the assignee to bring an action to set aside a fraudulent conveyance made *by* his assignor or a fraudulent lien created *by* him. *Mishawaka W. Mfg. Co. v. Smith,* 158 Fed. 885. Under the recent decisions of the federal courts the filing of a petition in bankruptcy does not amount to an equitable levy or attachment upon the property of the bankrupt, and the conditional vendor of property under an unfiled contract of sale has repeatedly been permitted to recover the same from the trustee in bankruptcy. The federal courts hold that the trustee takes only the title which the bankrupt had, and that he takes the property subject to all lawful liens thereon and subject to all equities existing between the parties. *York Mfg. Co. v. Cassell,* 201 U. S. 344; *Bryant v. Swofford Bros. D. G. Co.* 214 U. S. 279; *Yeatman v. Savings Inst.* 95 U. S. 764; *In re Platteville F. & M. Co.* 17 Am. Bankr. Rep. 291; *Mishawaka W. Mfg. Co. v. Smith,* 158 Fed. 885; *Thompson v.*

Fairbanks, 196 U. S. 516; *Humphrey v. Tatman,* 198 U. S. 91; *Hauselt v. Harrison,* 105 U. S. 401; *In re New York E. P. Co.* 6 Am. Bankr. Rep. 615; *In re Cavagnaro,* 16 Am. Bankr. Rep. 320; Loveland, Bankr. (3d ed.) pp. 445, 448, 450; Collier, Bankr. (7th ed.) p. 765; 1 Remington, Bankr. § 1144.

Howard Teasdale, for the respondent.

VINJE, J. Under the provisions of sec. 2317, Stats. (1898), the contract set out in the complaint is void as to creditors of the vendee without notice. That section reads:

"No contract for the sale of personal property, by the terms of which the title is to remain in the vendor and the possession thereof in the vendee until the purchase price is paid or other conditions of sale are complied with, shall be valid as against any other person than the parties thereto and those having notice thereof unless such contract shall be in writing, subscribed by the parties, and the same or a copy thereof shall be filed in the office of the clerk of the town, city or village where the vendee resides, or if he shall not be a resident of the state then in the office of the clerk of the town, city or village where the property may be at the time of making such contract, and such clerk shall file, keep and index the same in like manner as mortgages of personal property and receive a like compensation therefor; but the effect of such filing shall not extend for more than one year after the time fixed for payment of the contract price or for the performance of the other conditions of such sale."

In the case of *S. L. Sheldon Co. v. Mayers,* 81 Wis. 627, 51 N. W. 1082, it was held that such a contract was void as to the assignee for the benefit of creditors of the vendee; that as to them, title passed to the vendee, and the assignee was entitled to the possession of the property sold under the contract. The decision in that case governs this. True, it was decided under the provisions of ch. 170, Laws of 1882, which reads:

"In all cases of voluntary assignment for the benefit of creditors made under the provisions of ch. 80 of the Revised

Statutes, the assignee or assignees shall be considered as representing the rights and interests of the creditors of the debtor or debtors making the assignment, as against all transfers and conveyances of property which would be held to be fraudulent or void as to creditors; and shall have all the rights which such creditors would have to bring and maintain an action to avoid such fraudulent conveyances and transfers."

That chapter was repealed by the Statutes of 1898, but sec. 1693*c*, Stats. (Supp. 1906), enacted in 1901 (ch. 207), confers upon the assignee all the rights conferred by ch. 170, Laws of 1882, and additional ones also. That section provides:

"In all cases of voluntary assignment for the benefit of creditors made under the provisions of the laws of this state the assignee or assignees shall be considered as representing the rights and interests of the creditors of the debtor or debtors making the assignment, as against all transfers and conveyances of property and all liens or charges thereon which would be held to be fraudulent or void as to creditors; and shall have all the rights which such creditors would have to bring and maintain an action to avoid said fraudulent conveyances and transfers."

It is evident that if ch. 170 was broad enough to confer upon the assignee the rights of creditors sufficiently to render the conditional sale void as to him, then all the more so must sec. 1693*c* confer such rights, for it contains all the provisions of ch. 170 and, in addition thereto, after the words "and conveyances of property" the words "and all liens and charges thereon."

Our attention is called to the federal rule that a trustee in bankruptcy takes only such title as the bankrupt held and acquires no greater rights than he had. 1 Remington, Bankr. § 1144; *In re Pittsburgh Ind. Iron Works,* 179 Fed. 151. That is the federal rule unaffected by statute. The same rule prevailed in this state previous to the enactment of ch. 170, Laws of 1882. See *Hawks v. Pritzlaff,* 51 Wis.

160, 7 N. W. 303. But the federal courts also hold that where there has been some transfer or incumbrance of property void as to creditors by state law for want of record or otherwise, the trustee succeeds to the rights of any creditor who may be qualified under the state law to avoid the transfers or incumbrances or to take advantage of the fraud. 1 Remington, Bankr. § 1207. The state statute and the interpretation given it by the highest court thereof as to ownership and other interests in property will control the federal courts, unless affected by the peculiar provisions of the bankruptcy act itself. 1 Remington, Bankr. § 1139; *York Mfg. Co. v. Cassell,* 201 U. S. 344, 26 Sup. Ct. 481. The circuit court properly sustained the demurrer to the complaint.

By the Court.—Order affirmed.

LISTMAN MILL COMPANY, Appellant, vs. AVERY SCALE COMPANY and another, Respondents.

January 13—January 31, 1911.

Sale: Warranty: Breach: Evidence.

Where an automatic grain scale was sold under a guaranty that it would weigh accurately within one eighth of one per cent., evidence of numerous tests showing discrepancies averaging slightly greater than said percentage, but so uniform as to indicate lack of adjustment rather than inaccuracy, is *held,* especially in view of the conditions surrounding the tests, not to show a failure to fulfil the contract requirement.

APPEAL from a judgment of the circuit court for La Crosse county: E. C. HIGBEE, Circuit Judge. *Affirmed.*

This is an action against the principal and surety upon an indemnity bond. Judgment of nonsuit was entered at the close of plaintiff's evidence and it appeals from that judg-

ment. The evidence showed that plaintiff is a domestic corporation operating a flouring mill at La Crosse, the defendant *Avery Scale Company* a domestic corporation which manufactures automatic scales at North Milwaukee, and the defendant *American Bonding Company* a foreign corporation doing a suretyship business in this state; that in November, 1907, the defendant scale company sold to the *Listman Company* by written contract an automatic scale with a capacity of twenty bushels per discharge, and agreed to erect and install the same in plaintiff's mill for the sum of $650; that the contract further provided that the scales should work satisfactorily, and that if they failed to weigh within one eighth of one per cent. on clean wheat, after the scale company had been given reasonable opportunity to remedy the difficulty, they would be taken back and the purchase money refunded; that the bond in suit was given at the same time, conditioned to comply with all the terms of the contract; that the scale was installed about January 12, 1908; that some difficulties and defects were claimed by the plaintiff to exist in its operation and that the scale company sent men at various times to remedy the same; that in March, 1908, the plaintiff began making daily tests of the operation of the scale and continued the same until about August 1st following; that in September following the plaintiff took out the scale, claiming that it did not fulfil the contract, and informed the scale company that it was subject to its order. It further appeared without dispute that the plaintiff had paid the purchase price of $650 some sixty days after the contract of sale was entered into, and this action was brought to recover the said purchase price.

George H. Gordon, for the appellant, contended that the doctrine of substantial performance does not apply, because the contract expressly limited the extent to which the scale might vary from the true weight, and because, by reason of its inaccuracy, the scale does not answer the purpose for which it was purchased. *Manning v. School Dist.* 124 Wis. 84, 108; *Manitowoc S. B. Works v. Manitowoc G. Co.* 120

Wis. 1; *Meincke v. Falk,* 61 Wis. 623; *Mueller v. Burton,* 139 Wis. 384.

Louis G. Bohmrich, for the respondents.

WINSLOW, C. J. The trial judge nonsuited the plaintiff on the ground that the evidence failed to show any breach of the contract of sale, but rather showed that such contract had been substantially performed within the definition of substantial performance given by this court in *Manning v. School Dist.* 124 Wis. 84, 102 N. W. 356, and *Mueller v. Burton,* 139 Wis. 384, 121 N. W. 152, 176. After careful consideration of the evidence as preserved in the bill of exceptions, we are unable to say that the conclusion of the trial court, giving it that weight to which it is entitled, was wrong.

The sole defect claimed in the scale was that it did not fulfil the guaranty that it would weigh grain accurately to within one eighth of one per cent. of clean wheat, and the proof submitted consisted of tabulated statements of tests made for sixty-four days, beginning March 20, 1908, and ending about August 1st of the same year. The scale in question was an automatic self-registering scale, so arranged as to weigh about twenty bushels of grain, record the weight automatically, dump the amount weighed, receive and weigh another load, and thus proceed as long as the machinery was running and grain was delivered to it. It was located in the upper part of the mill and some sixty-five feet above what is called the hopper scale, which holds about 1,000 bushels before it discharges and into which the cleaned wheat first goes. After being weighed in the hopper scale it is taken by a pocket elevator up seven floors, dumped in a bin, and carried by pocket elevators from this bin to the Avery scale in question and there reweighed.

The tests before mentioned were comparisons between the weights registered by the scale in question and the weights recorded by the hopper scale. Varying amounts, ranging from half a million to more than a million pounds per day,

were thus weighed upon the two scales during the sixty-four days when the tests were made. There was sufficient evidence, *prima facie* at least, to show that the hopper scale was accurate.

It will be unnecessary to insert the tabulated statement of tests made. During the month of March and the first half of April there was a considerable discrepancy between the two scales, which averaged considerably more than the allowed percentage, but beginning with April 15th the differences are slight and become very uniform.

The discrepancy allowed by the contract was one eighth of one per cent., or, expressed in decimals, .00125. The average discrepancy shown by the totals from April 15th to July 31st inclusive is .00141, and upon every day, except one, beginning with April 28th the weight registered by the scale in question is slightly less than that registered by the hopper scale, showing very clearly that the difficulty is one of adjustment rather than inaccuracy.

Taking the six weeks period from May 20th to June 30th inclusive, during which time tests were carried on during nineteen entire days, the discrepancies average .00122 plus, which is below the allowed percentage. In July there is a slight increase in the percentage, but quite a uniform one, which again indicates that the difficulty must be simply one of adjustment.

Considering the fact that comparison is made between a scale registering a thousand bushels at a load and one registering but twenty bushels and that the grain is carried through two sets of elevators and one bin before being delivered on the second scale, we think that the infinitesimal difference between the discrepancy contracted against and the one actually shown cannot be considered as even tending to show that the scale did not, when properly adjusted, fulfil the contract requirements.

By the Court.—Judgment affirmed.

FLANNAGAN, Respondent, vs. BUXTON and others, imp., Appellants.

January 13—January 31, 1911.

Municipal corporations: Implied powers: Villages: Employment of private detectives.

1. **Municipal corporations may exercise only such powers as are clearly embraced within the legislative grant or those derived therefrom by necessary implication.**
2. **Under sec. 893, Stats. (1898), granting to the village board power to establish ordinances "for the government and good order of the village, the suppression of vice and immorality, the prevention of crime," etc., and "to appoint policemen, night watchmen and superintendent of police, and to prescribe their duties," there is no implied authority, unless under special and extraordinary circumstances, to employ private detectives to investigate and report upon violations of law in the village.**

APPEAL from an order of the circuit court for Vernon county: E. C. HIGBEE, Circuit Judge. *Affirmed.*

The plaintiff, a resident elector, property owner, and taxpayer of the village of Readstown, brings this action to recover the sum of $95. It is alleged that certain of the defendants, under claim that they acted as officers of the village, instructed the defendant village treasurer to draw expense warrants on the village treasury, that the president and treasurer did draw them, and that the village treasurer paid them out of the village funds. The expense warrants were drawn for detective work in favor of Walter Garder, an agent of the defendant the American Detective Service Company. It is alleged that the resolution of the board of trustees authorizing the employment of the defendant the American Detective Service Company stated that it was "to investigate and report upon violations of the laws in said village of Readstown." It is alleged that these payments were made without authority in the law and that they were unlawful. Plaintiff demands recovery in behalf of the village of the amount so paid out of the village funds, and for his costs and

disbursements. This is an appeal from the order of the court overruling a demurrer to the complaint.

The cause was submitted for the appellants on the brief of *C. W. Graves,* and for the respondent on that of *C. J. Smith.*

SIEBECKER, J. The contention of the defendants is that the funds of the village were properly applied to a village debt which had been rightfully incurred in the execution of corporate functions in administering the government of the village. Sec. 893, Stats. (1898), grants villages the power to establish ordinances and by-laws for the government and maintenance of good order of the village, the prevention of crime, and the suppression of vice and immorality, and authorizes the village board "to appoint policemen, nightwatchmen and superintendent of police, and to prescribe their duties. . . ." No express grant of power is conferred authorizing these village boards to employ private detectives for the purpose of conducting an investigation to ascertain whether the criminal laws have been violated within the village. It is argued that, though such power is not expressly conferred, it is an incident to the corporate functions which impose on the village officers the duty of employing the measures necessary to maintain security and good order and to enforce the law by the prosecution and punishment of offenders.

The policy of the state is that municipal corporations are to exercise only such powers as are clearly embraced within the legislative grant or those derived therefrom by necessary implication, and to this end municipal grants of power are construed so as to confine the corporate authorities to the employment of such means and measures as are necessary to effectually execute the powers conferred. Upon this subject this court in *Butler v. Milwaukee,* 15 Wis. 493, declared:

"Implications of authority in bodies corporate, more especially those created for municipal purposes, should be clear and undoubted. . . . Implications spring from the necessities of some power actually conferred, and not from notions

of what would be convenient or expedient under particular circumstances."

See, also, *Davis v. Cherry,* 53 N. J. Law, 173, 20 Atl. 825; McQuillin, Mun. Ord. § 53 *et seq.;* 28 Cyc. 262, "(d) Implied Powers."

Applying these principles of construction to the instant case, can it be said that the powers conferred and the duties imposed on the village officers authorize the employment of detectives to conduct an investigation to ascertain whether the laws have been or are being violated within the village? The legislature has conferred authority on village boards to appoint officers for policing the village. This express grant provides a means for carrying into effect its general police authority to secure peace and good order in the village and the enforcement of the criminal law. In the judgment of the legislature this provided a proper and adequate means to execute these corporate functions in the state of affairs that is generally and ordinarily expected to exist in these communities, and negatives any implication of authority to employ other and private agencies to discharge these corporate functions. Should an extraordinary and unusual state of affairs arise respecting the violation of criminal law, which of necessity called for special and extraordinary means on the part of the village authorities to discharge these corporate functions, an implication of authority might arise for the employment of means and measures, in addition to those expressly conferred, which would be commensurate to meet the necessities of such an occasion. But no such occasion is presented under the allegations of the complaint.

We are of opinion that the trial court properly held that under the facts as alleged the village officers acted without authority in authorizing the employment of a private detective to investigate and report upon violations of the law in the village and in applying village funds in payment of such service.

By the Court.—The order appealed from is affirmed.

SANBORN and another, Respondents, vs. WALTERS, imp., Appellant.

January 13—January 31, 1911.

Bills and notes: Limitation of actions: Partial payment: Evidence: Sufficiency: Inferences: Circumstantial evidence.

1. A finding by the jury to the effect that a certain payment made upon a promissory note within six years prior to the action was made in part by each of the defendants, is *held* to be sustained by the evidence.
2. A jury may draw legitimate inferences from the facts established.
3. A material fact in a civil or criminal case may be established by circumstantial evidence, when the circumstances are such as to lead fairly and reasonably to the conclusion sought to be established.

APPEAL from a judgment of the circuit court for La Crosse county: E. C. HIGBEE, Circuit Judge. *Affirmed.*

A. P. Parsons, for the appellant.

For the respondents there was a brief by *Carl F. Geilfuss* and *J. E. Higbee,* and oral argument by *Mr. Higbee.*

KERWIN, J. This action was brought to recover a balance due on a promissory note for $2,500 executed November 22, 1901, by the defendants as joint makers. There was a verdict and judgment for the plaintiff against defendant *Herman H. Walters,* no service being had on defendant Emil R. Walters. Defendant *Herman H. Walters* appealed.

The only question involved is whether there was evidence sufficient to support the verdict on the question of payment of $200 December 15, 1903, by defendant *Herman H. Walters,* which payment, if made, prevented the bar of the statutes of limitation, which was the only defense urged, the execution and delivery of the note being admitted. Divers payments of interest were made between November 1, 1902, and November 27, 1903, and $500 on the principal Novem-

ber 1, 1902, besides the $500 paid December 15, 1903, which latter payment defendant *Herman H. Walters* claims was made by Emil R. Walters, and no portion of it by him, therefore the statute had run against the note as to him when suit was brought in October, 1909. The plaintiff's contention is that $200 of the $500 payment made December 15, 1903, was made by defendant *Herman H. Walters.* The jury found that it was, and we think the verdict is supported by the evidence.

On the question of payment of the $500 indorsed on the note December 15, 1903, one of the plaintiffs testified: "*Q.* Do you know whether this $500 was paid by Emil or *Herman Walters?* *A.* I had a draft of $200 bearing *Herman Walters's* signature and $300 in cash was paid me by Emil Walters at my office in Milwaukee." There was also testimony to the effect that *Herman Walters* had made payments on the note prior to December 15, 1903. The defendant *Herman Walters* was called by the plaintiff and examined as an adverse witness under sec. 4068, Stats. (1898), and denied that he had ever paid any amount on the note, except that he loaned to his brother some money to make up the first $500 payment. This evidence was shown by letters written by defendant *Herman Walters* to be so incredible that the jury would be warranted in disbelieving it. One letter written by him to *James S. Sanborn,* one of the plaintiffs, shows that the $500 payment of November 1, 1902, was made by defendant *Herman Walters.* There are other facts and circumstances in the record tending to show that defendant *Herman Walters* did contribute to the payment of $500 made December 15, 1903. Where there is any credible evidence to support a verdict it cannot be disturbed. *Wis. F. L. Co. v. Bullard,* 119 Wis. 320, 96 N. W. 833; *Nolan v. Kroening,* 130 Wis. 79, 109 N. W. 963; *Bazelon v. Lyon,* 128 Wis. 337, 107 N. W. 337; *Roedler v. C., M. & St. P. R. Co.* 129 Wis. 270, 109 N. W. 88; *Hein v. Mildebrandt,* 134 Wis. 582,

115 N. W. 121; *Sheboygan Co. v. Sheboygan Falls,* 135 Wis. 128, 115 N. W. 330.

Counsel for appellant contends that the verdict is based upon inference. But the jury were entitled to draw legitimate inferences from the facts established. *Meyer v. Hope,* 101 Wis. 123, 129, 77 N. W. 720; *Gates v. Hughes,* 44 Wis. 332, 336. Where there is any credible evidence from which a reasonable inference can be drawn in support of the claim of either party the question is for the jury. *Kersten v. Weichman,* 135 Wis. 1, 114 N. W. 499; *Morgan v. Pleshek,* 120 Wis. 306, 97 N. W. 916; *Beyer v. St. Paul F. & M. Ins. Co.* 112 Wis. 138, 88 N. W. 57.

A material fact in a civil or criminal case may be established by circumstantial evidence, when the circumstances are such as to lead fairly and reasonably to the conclusion sought to be established. In the instant case we think the jury were warranted in finding as they did, therefore the judgment must be affirmed.

By the Court.—The judgment of the court below is affirmed.

WELCH, Plaintiff in error, vs. THE STATE, Defendant in error.

January 13—January 31, 1911.

Criminal law: Food: "Furnishing" oleomargarine for butter: Intent: Ignorance of fact.

1. One who, for the purpose of delivering or selling to others, selects and collects together articles of food, with opportunity for examination, and thereafter delivers them to guests and patrons, "furnishes" an article so delivered, within the meaning of sec. 4607*d*, Stats. (1898), although throughout the transaction he acts only as the agent of the owner of the food.
2. So *held* as to a waiter in charge of a railway lunch counter, who delivered to a patron oleomargarine which had been supplied

by the railway company for such counter upon the waiter's requisition for butter.

3. Where a statute prohibits wilful, intentional, or malicious doing of an act, or where a particular intent is a necessary constituent of a common-law offense, such intent is an essential of guilt; but where a statute commands that an act be done or omitted, which in the absence of the statute might be done or omitted without culpability, ignorance of the fact or state of things contemplated by the statute will not excuse its violation.

[4. Whether, under such a statute, one could be convicted who had no opportunity to avoid the forbidden act, not determined.]

ERROR to review a judgment of the circuit court for Portage county: CHAS. M. WEBB, Circuit Judge. *Affirmed.*

W. A. Hayes, for the plaintiff in error.

For the defendant in error there was a brief by the *Attorney General, A. C. Titus,* assistant attorney general, and *Geo. B. Nelson,* district attorney, and oral argument by *Mr. Nelson.*

TIMLIN, J. The plaintiff in error, after waiving a jury trial, was found guilty and sentenced to pay a fine of $100 under sec. 4607*d,* Stats. (1898), for furnishing oleomargarine at a certain lunch counter in the city of Stevens Point to one R. B. Southard, a guest and patron at said lunch counter, without first notifying said Southard that the substance so furnished to him was not butter.

It is contended that the accused believed the substance to be butter, was without evil intent, and did not furnish the substance within the meaning of the word "furnish" in the statute. The facts shown are: The accused was a waiter in charge of a lunch counter owned and operated by the Wisconsin Central Railway Company. He made requisitions upon some officer or employee of this corporation higher up in the scale of authority for the supplies to be consumed at the lunch counter, received them pursuant to such requisition, and delivered them to the patrons and guests as ordered by

the latter. He appears to have had no assistants, no subordinates, and no superiors in making the requisitions, receiving the goods, or delivering them to the guests or patrons. He gave his immediate superior an order for butter, received a package containing a substance resembling butter and which he believed to be butter. He did not notice whether there was a United States internal revenue stamp on the package, but did notice that it was marked in small print, " 'U. S. Inspected,' or something like that."

Where for the purpose of delivering or selling to others one selects and collects together, with opportunity for examination, and thereafter delivers from such collection to guests or patrons, he may be said to furnish the substance so delivered within the meaning of this statute, although he acts only as the agent of the owner in the whole transaction. This rule is deduced from the statute in question and authorities collected in 4 Words & Phrases relating to the word "furnish" under various circumstances and applied to different legal relations. It is a legal commonplace that penal statutes prohibiting not merely the doing of a described act but the wilful, intentional, or malicious doing of such act, if they do not require the prosecution in the first instance to prove something more than the doing of the prohibited act, at least permit the accused to exculpate himself by showing that although he did the act he did not do it wilfully, intentionally, or maliciously. Where a particular intent is necessary to constitute the offense, as *animus furandi* in larceny or malice in murder, ignorance or mistake of fact without negligence on the part of the accused may be ground for acquittal. As one exercising due care who might hand to the thirsty wayfarer who called for water a liquid exactly resembling water, believed to be water but in fact a deadly poison, causing death, would not be guilty of murder. Or one taking and carrying away property belonging to another under the honest but mistaken claim that the taker had legal title thereto

would not be guilty of larceny. On the other hand, it is also a legal commonplace that where a statute commands that an act be done or omitted which in the absence of such statute might be done or omitted without culpability, ignorance of the fact or state of things contemplated by the statute will not excuse its violation. As where one in the honest but mistaken belief that such person was adult sold intoxicating liquor to a minor who resembled an adult. *State v. Hartfiel,* 24 Wis. 60. Even a conscientious belief that an act is right, as labor on Sunday by a believer in the Jewish religion, will not exempt from liability where the statute makes no such exception. *Comm. v. Has,* 122 Mass. 40. Neither will a *bona fide* assertion of a political right pursuant to the advice of counsel learned in the law. *U. S. v. Anthony,* 11 Blatchf. 200. Or the fact that it was the custom of the country to do the prohibited act. *Bankus v. State,* 4 Ind. 114. The learned counsel for plaintiff in error raises a question which may be interpreted as lying somewhat deeper than these rules and we think not fully appreciated by the defendant in error. He asks: "Can a person be convicted of crime without having an opportunity to avoid the act which is held to constitute the crime?" The answer to this in the instant case is that the evidence does not present that question. The statute imposes a duty upon persons furnishing eatables in hotels, boarding-houses, restaurants, or lunch counters. When one enters upon the business of furnishing guests or patrons with eatables at any of the establishments mentioned he thereby undertakes to inform himself and to know the nature of the substance he is dispensing. The law casts on him this duty. He cannot enter into or continue the occupation and omit the duty. To furnish the substance without knowing what it is and without informing the guests is ordinarily to take the chances of violating the statute.

Defendant fails to show that there was no United States internal revenue stamp on this substance when he received it.

There ought to have been and presumably there was. He does show that he observed thereon the words "U. S. Inspected," or something of that kind. He had no reason to believe that butter is subject to United States inspection. He had opportunity for inquiry, examination, and rejection or acceptance and giving notice to guests. He seems to have resolved all doubts in favor of the substance being butter and to have forborne all inquiry or investigation and disregarded or misinterpreted all suggestions from the inspection stamp on the package. He is therefore not in a position to raise the question suggested by his counsel; but the case falls under the rule of *State v. Hartfiel,* 24 Wis. 60, and the conviction must be affirmed.

By the Court.—Judgment affirmed.

BIRMINGHAM, Plaintiff in error, vs. THE STATE, Defendant in error.

January 13—January 31, 1911.

Criminal law: Preliminary examination: Insufficiency of evidence: Objection, how taken: Appeal and error: Instructions to jury: Verdict, when upheld

1. Under sec. 4654, Stats. (1898), providing that no failure or omission of preliminary examination shall invalidate any information unless defendant shall take advantage thereof by plea in abatement, the objection that the evidence before the examining magistrate was insufficient to warrant a finding of probable cause to believe defendant guilty can be taken at the trial only by a plea in abatement.
2. Incompleteness of the charge of the trial court in a criminal case is not ground for reversal, where no instructions were asked by defendant.
3. Where there is credible evidence to support the verdict of guilty and the trial court has refused to set it aside, this court will not disturb it.

ERROR to review a judgment of the circuit court for Chippewa county: A. J. VINJE, Circuit Judge. *Affirmed.*

The plaintiff in error (hereinafter called the defendant) was tried on an information charging him with burglary in the nighttime, under sec. 4409, Stats. (1898). The jury returned a verdict of guilty and the defendant was sentenced to imprisonment for ten years. The defendant prosecutes a writ of error in this court to reverse the judgment of conviction and relies on the following errors for a reversal of the judgment: (1) Failure of the court to discharge the defendant because the evidence produced at the preliminary examination was not sufficient to warrant the examining magistrate in finding that there was probable cause to believe the defendant guilty of the offense charged; (2) in charging and in failing to charge the jury; (3) in admitting incompetent testimony; (4) in refusing to discharge the defendant because the evidence offered on the trial was insufficient to sustain a verdict of guilty.

V. W. James, for the plaintiff in error.

For the defendant in error there was a brief by the *Attorney General, Alexander Wiley,* district attorney, and *A. C. Titus,* assistant attorney general, and oral argument by *Mr. Wiley* and *Mr. Titus.*

BARNES, J. The trial court did not err in refusing to discharge the defendant on the ground that the evidence before the examining magistrate was insufficient to warrant a finding that there was probable cause to believe him guilty of the offense charged. First, because an examination of the testimony taken at the preliminary hearing convinces us that it was sufficient to warrant the examining magistrate in holding the defendant for trial; and second, under sec. 4654, Stats. (1898), the objection could only be taken by a plea in abatement, and no such plea was interposed.

Complaint is made of the charge to the jury. The alleged

error consists of an act of omission rather than one of commission. Little fault is found with what the court said and little fault could be found with it, because, to say the least, as far as it went it was beyond criticism. But it is urged that the charge was not complete in that the court failed to instruct the jury fully on certain matters. No instructions were asked by the defendant and hence no error was committed. *McCummins v. State,* 132 Wis. 236, 112 N. W. 25; *Larson v. Foss,* 137 Wis. 304, 118 N. W. 804; *Van de Bogart v. Marinette & M. P. Co.* 127 Wis. 104, 106 N. W. 805; *Hepler v. State,* 58 Wis. 46, 16 N. W. 42; *Sullivan v. State,* 100 Wis. 283, 75 N. W. 956.

Two errors are assigned on the admission of evidence. The testimony complained of might not have been very convincing, but it was competent.

The principal contention of the defendant, and the one in reference to which we entertain the gravest doubts, is that the evidence offered on the trial was not sufficient to warrant a verdict of guilty. The evidence was wholly circumstantial and the state fell far short of making a strong case on such evidence. But the jury has returned a verdict of guilty and the trial court has refused to disturb that verdict. If there is any credible evidence which supports such verdict this court will not disturb it, and the finding of the trial court that there is such evidence will not be overruled unless it appears to be clearly wrong. *Lam Yee v. State,* 132 Wis. 527, 112 N. W. 425; *Casper v. State,* 47 Wis. 535, 2 N. W. 1117; *Williams v. State,* 61 Wis. 281, 21 N. W. 56; *Boyle v. State,* 61 Wis. 440, 21 N. W. 289; *Sontry v. State,* 67 Wis. 65, 30 N. W. 226; *Barnard v. State,* 88 Wis. 656, 60 N. W. 1058; *Jambor v. State,* 75 Wis. 664, 44 N. W. 963; *Vogel v. State,* 138 Wis. 315, 321, 119 N. W. 190. It was for the jury to draw the inferences arising from the established facts. Whether the conclusion reached has sufficient support in the evidence is a close question. But we are not convinced that

the finding of the jury and the ruling of the trial court holding that such finding was sustained by the evidence are clearly wrong, and we must therefore decline to disturb the judgment of conviction. It is improbable that another case will arise where a chain of circumstances such as were testified to in the present case will exist, and a recital of the evidence upon which the conviction was based would serve no useful purpose.

By the Court.—Judgment affirmed.

[VINJE, J., took no part.

H. W. WRIGHT LUMBER COMPANY, Respondent, vs. MCCORD, Appellant.

November 15, 1910—February 21, 1911.

Estoppel: Married women: Dower: Acquiescence in void divorce and remarriage of husband: Innocent purchasers.

1. In this state the doctrine of equitable estoppel applies as well to married women as to other persons.
2. One who culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict, cannot afterwards dispute the fact in an action against the person whom he has thus assisted in deceiving.
3. During many years, and until her husband's death, a wife allowed to go unchallenged his claim that he had procured a divorce, and in silence permitted him to hold out as his lawful wife another woman, whom he had publicly married. She knew that the alleged divorce, if any existed in fact, was invalid, and knew or had good reason to believe that he was engaged in large business transactions and dealing daily with people who in good faith accepted his second marriage as valid; and knew also that it was necessary for the wife to sign conveyances of the husband's real estate, and that such conveyances were probably being signed by the reputed wife and being accepted by the grant-

ees. *Held*, that by such conduct she was estopped, as against the innocent purchasers from the husband, from claiming any dower in lands conveyed by him in his lifetime.

4. Where both husband and wife are residents of this state, any decree of divorce by a court of another state can have no validity.

5. As between two equally innocent parties, equity demands that that one shall suffer whose conduct has placed it in the power of a wrongdoer to deceive the other.

APPEAL from a judgment of the superior court of Lincoln county: ALMON A. HELMS, Judge. *Affirmed.*

This is an action under sec. 3186, Stats. (1898), to quiet the plaintiff's title to three parcels of land in the city of Merrill on which the plaintiff's manufacturing plant and yards are situated. The defendant claims dower in the lands as the widow of one Myron H. McCord, deceased. The material facts appearing on the trial were not in serious dispute and were substantially as follows: Myron H. McCord acquired a tax title to two of the parcels in the year 1878, and a quitclaim title to the remaining parcel in the year 1880. As to two of the parcels the title then acquired is claimed to have been worthless, but under the view which we have taken of the case it is not necessary to decide the question. He claimed title to all three of the parcels in September, 1881, when he formed a copartnership with Henry W. Wright, deceased, under the firm name of McCord & Wright, and commenced the manufacture of lumber in the mill upon the premises. In 1882 he obtained another title to the two parcels before mentioned as to which his title was doubtful, and in the same year conveyed an undivided one-half interest to his partner, Wright, in the entire three parcels. The premises were thereafter used in the partnership business until April 17, 1883, when the partnership was dissolved, Mr. McCord selling out his interest to Mr. Wright, who assumed all debts and took all property, including the lands in question, paying McCord $30,342.23 for his interest in the business and property. Of this last named amount, $20,000 was secured by mortgage on the lands in question.

It appears by the evidence that when McCord sold out to Wright, the firm property, including the real estate in question, was inventoried at $215,000 and the indebtedness at $145,000, and the land in question was estimated in the inventory to be worth $60,000. Wright conducted the business alone until June 25, 1883, when he made a general assignment for the benefit of his creditors, which included the lands in question. Two of the parcels were afterwards conveyed by the assignee to third persons, and some time later, Mr. Wright having settled up with his creditors, there was formed the present corporation, and the two parcels which had been conveyed to third persons were purchased by the corporation and conveyed to it in 1889. In 1890 said corporation acquired title to the remaining parcel, and has carried on its lumber manufacturing business in the plant upon the three parcels ever since its incorporation. The $20,000 mortgage which Mr. McCord received was paid and satisfied August 25, 1884.

The claim of the defendant for dower arises thus: Myron H. McCord and the defendant were married at Shawano, Wisconsin, April 15, 1861, and resided there until the winter of 1874–75, during which time a number of children were born to them. During the winter last named Myron H. McCord went to the village of Jenny (now Merrill), Wisconsin, and established a newspaper, which he published for about ten years. On going to Jenny he left the appellant and the children at Shawano for a time, but they followed during the following summer and lived with him until some time in 1876, when *Mrs. McCord* with the children went back to Shawano on a visit at McCord's request. While there she received through the mail a newspaper containing a notice or summons in a case entitled *Myron H. McCord v. Anna M. McCord,* purporting to be pending in some court in Utah. Soon thereafter she returned to Jenny with two of the children and met Mr. McCord, who threw a paper in her lap, telling her, "Here's your divorce; I am through with you,"

and requesting her to return to Shawano. She did not read the paper and does not know what became of the same, but thought at the time that the divorce was not legal. A few days after this she took her children and returned to Shawano, and later in the year met Mr. McCord at Oshkosh and had some negotiation with him, as a result of which he deeded several pieces of land to her, including a store building in Shawano, and agreed to pay weekly certain sums for the support and education of the children. After the meeting at Oshkosh he returned with her to Shawano for a few days and promised to return again at Thanksgiving time, but did not do so. The parties continued to live separate, and on August 25, 1877, Mr. McCord publicly married Sarah Etta Space at Jenny and continued to reside there until 1893. During all of this time Mr. McCord and Miss Space lived together publicly as man and wife and were popularly supposed to be such. As before stated, Mr. McCord went into business with Wright in 1881 and the business grew to large proportions. He engaged in logging and other enterprises and actively participated in politics, held a number of local offices, and in 1888 was elected to Congress. He acquired lands and made many sales and deeds of the same, and in all these deeds, including the deeds of the lands in controversy, Miss Space joined in the execution thereof as his wife. Such deeds were apparently accepted not only by the grantors of the plaintiff, but also by all other persons who dealt with Mr. McCord, as perfect deeds and conveyances, upon the understanding that the marriage to Miss Space was a legal marriage. The defendant learned of the marriage to Miss Space very soon after it occurred. She never at any time in any public way questioned the validity of that marriage or assumed that she was still the wife of Mr. McCord. In explanation of her conduct she testified at one time in her examination that she "didn't know but what his divorce was legal, and thought, of course, he wasn't a man that would do any-

thing of that kind so openly unless there was something in it," and that she might in this way think that the divorce was legal, but she further testified as follows:

"*Q.* Can you give any reason why you didn't do something to compel him to support you? *A.* I can't give any reason, only that we were getting along there by doing as we had done, and I let matters rest. He never threatened me if I made trouble. I don't suppose he thought I would ever make any trouble. *Q.* Did you keep from making any trouble, or insisting upon any rights you may have had, because you were afraid he would injure you in any way? *A.* It was because he didn't like the thing to be made public; he wished I wouldn't do anything; he might have been arrested, in prison, and didn't want anything like that to happen. Didn't want me to stir up any scandal, or disgrace our children. That is about the only reason I can recollect why I didn't do it."

It further appears that *Mrs. McCord* knew generally that her husband was in business at Merrill and doing considerable business; that she knew that when a man deeded land his wife had to sign the deed, and that she had frequently signed deeds with Mr. McCord during her married life; that the children at times went to Merrill and visited their father. Mr. McCord removed to Arizona in 1893 with his second wife, and they continued to live together as husband and wife until 1903, when his second wife died, and Mr. McCord remarried and lived with his third wife in Arizona until his death, April 27, 1908. In June, 1908, the defendant served notice on the respondent demanding that her dower be admeasured to her, and this action was begun by the plaintiff shortly thereafter.

The trial court held that *Mrs. McCord* by her silence had estopped herself from claiming dower from the lands in question as against the grantors of the plaintiff, who were *bona fide* purchasers for value, and entered a decree quieting the plaintiff's title. From this judgment the defendant appeals.

For the appellant there were briefs by *Thomas J. Mathews,* attorney, and *Brown, Pradt & Genrich,* of counsel, and oral argument by *L. A. Pradt.* On the question of estoppel they cited the following, among other authorities: *Kingman v. Graham,* 51 Wis. 232, 248; *Loizeaux v. Fremder,* 123 Wis. 193, 199; *Hunt v. Reilly,* 24 R. I. 68, 52 Atl. 681; *Rockwell v. Rockwell,* 81 Mich. 493, 46 N. W. 8; *Bartlett v. Kander,* 97 Mo. 356; *Madson v. Madson,* 80 Minn. 501, 71 N. W. 824; *Stevens v. Wooderson,* 38 Ind. App. 617, 78 N. E. 681; *Grober v. Clements,* 71 Ark. 565, 76 S. W. 555; *Norton v. Tufts,* 19 Utah, 470, 57 Pac. 409; *Hilton v. Roylance,* 25 Utah, 129, 69 Pac. 660; *Burgess v. Seligman,* 107 U. S. 20; *Dunn v. Portsmouth Sav. Bank,* 103 Iowa, 538, 72 N. W. 687; *Martin's Heirs v. Martin,* 22 Ala. 86; *De France v. Johnson,* 26 Fed. 891; *Cole v. Cole,* 142 Ill. 19, 38 N. E. 703; *Colton's Estate,* 129 Iowa, 542, 105 N. W. 1008; *Gilman v. Sheets,* 78 Iowa, 499, 43 N. W. 299; *Reel v. Elder,* 62 Pa. St. 308, 1 Am. Rep. 414; *Sammons v. Pike,* 108 Minn. 291, 120 N. W. 540; *Nash v. Baker,* 40 Neb. 294, 296. During the life of the husband the wife's dower right was inchoate merely, and failure to exercise it could not work estoppel. *Beeman v. Kitzman,* 124 Iowa, 86, 99 N. W. 171; *Buzick v. Buzick,* 44 Iowa, 259, 24 Am. Rep. 740. The wife could be barred of her dower only in one of the modes prescribed by our statute. *Wilber v. Wilber,* 52 Wis. 298; *Huntzicker v. Crocker,* 135 Wis. 38; *Harley v. Harley,* 140 Wis. 282; *Farnsworth v. Cole,* 42 Wis. 403; *Motley v. Motley,* 60 Neb. 593, 73 N. W. 738; *Grady v. McCorkle,* 57 Mo. 172, 17 Am. Rep. 676; *Haller v. Hawkins,* 245 Ill. 492, 92 N. E. 299.

John Van Hecke, attorney, and *Edward M. Smart,* of counsel, for the respondent, cited, among other authorities, *Nuhn v. Miller,* 5 Wash. 405, 34 Am. St. Rep. 868; *Edgar v. Richardson,* 33 Ohio St. 581; *Davis v. Calvert,* 18 Ky. Law Rep. 975, 38 S. W. 884; *Maher v. Title G. & T. Co.* 95

Ill. App. 365; *Dimond v. Manheim,* 61 Minn. 178, 63 N. W. 495, 497; *Hilbish v. Hattle,* 145 Ind. 59, 44 N. E. 20; *Two Rivers Mfg. Co. v. Day,* 102 Wis. 328; *Holcomb v. Ind. School Dist.* 67 Minn. 321, 69 N. W. 1067; *Rosenthal v. Mayhugh,* 33 Ohio St. 155.

The following opinion was filed December 6, 1910:

WINSLOW, C. J. It is claimed by respondent that the parcels of land in question were either contributed by McCord to the capital of the firm of McCord & Wright or were purchased with partnership funds, and in either case became partnership property and not the subject of dower until all of the debts of the firm had been paid. The further claim is made that two of the parcels at least were necessarily used and absorbed for the purpose of paying such debts, and hence that the defendant can claim no dower in them.

We do not find it necessary to decide these questions. We shall assume for the purposes of the case that the defendant at one time had an inchoate right of dower in all of the lands in question and that she still retains it unless by her silence she has estopped herself from making the claim.

This court, in common with the majority of courts in this country, has long since abandoned the ancient rule that the doctrine of equitable estoppel has no application to married women. Our statutes have endowed married women with very full and complete rights, not only as to their separate property, but also as to their liberty of conduct, and have given them practically perfect freedom to deal with property, to contract for their personal services, to conduct their separate business, to bring suits for the enforcement of their rights, and generally to control their own actions without let or hindrance from their husbands. With these rights necessarily come some added responsibilities. Privilege and opportunity always bring with them corresponding duties. When a woman's personality was considered to be submerged

in that of her husband, it might well be held that she should be held to be under no responsibility for her acts; but when she stands on a level with her husband and becomes practically master of her own property and destiny, it seems plain that she must logically be charged with the duties and responsibilities which attend every other free and independent personality in its dealings with its peers. 2 Pomeroy, Eq. Jur. (3d ed.) § 814.

The rule is correctly stated by this court in *Godfrey v. Thornton,* 46 Wis. 677 (1 N. W. 362), at page 690, as follows: "Whatever may be the rule concerning the formalities needed to bind married women, there is no doubt they may be estopped by their deliberate conduct as well as any one else." This rule was in effect applied by this court in the cases of *Nelson v. McDonald,* 80 Wis. 605, 50 N. W. 893; *S. D. Seavey Co. v. Campbell,* 115 Wis. 603, 91 N. W. 655; and *Merrell v. Purdy,* 129 Wis. 331, 109 N. W. 82.

One of the most frequent instances of equitable estoppel is the estoppel by silence. Quoting from 2 Herman on Estoppel (§ 937, p. 1062), "He who is silent when conscience requires him to speak, shall be debarred from speaking when conscience requires him to keep silent;" or to express the principle more concretely, "A party who culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict, cannot afterwards dispute the fact in an action against the person whom he has thus assisted in deceiving." Id. § 943, p. 1069.

The question in this case is, Did *Mrs. McCord* culpably stand by, knowing that she was the lawful wife, and allow people to deal with Mr. McCord and purchase land of him in the innocent belief that Miss Space was his lawful wife? That she stood silently by for years and knowingly allowed McCord to hold out to the world at large that Miss Space was his lawful wife, there can be no doubt. She admits this herself. That she knew he was transacting business with oth-

ers, and business of some considerable proportions, there can be no doubt. She knew by her own admission that a wife was obliged to sign her husband's deeds of land. She had done it many times herself while they were living together, and she admits that she signed the deeds to some lands in Shawano a few years after McCord's second marriage, because the purchaser did not want to take the deeds without her signature. It seems very certain that she must have known that there were undoubtedly other transfers of land likely at any time to be made by her husband to which her signature must be necessary if she was still his lawful wife. She knew also of the public marriage of McCord, of the apparent acceptance by the people of Merrill of its validity, and she must have known that whenever he made a transfer of land, save in the one instance above cited, the second wife was undoubtedly signing the deed as the lawful wife and that such signature was being accepted as such by purchasers. All these conclusions seems to us as necessarily resulting from the evidence. The defendant was distant but a few hours' ride from her husband's residence. If the second marriage was a bigamous marriage to her knowledge, a mere notice in the newspaper or a letter to a friend at Merrill would have apprised the world of the fact and put people dealing with Mr. McCord on their guard. But such a warning never came. She deliberately and consistently held her peace, and the public accepted the situation, supposed that McCord had been divorced and had lawfully remarried, and dealt with him and his apparent wife just as they dealt with other men and women living together in the ordinary manner as husband and wife and reputed to have been legally married.

This state of things had existed some five years when Mr. McCord sold and transferred an undivided half of the premises to Mr. Wright, who was found upon sufficient evidence to be an innocent purchaser. A year or so later McCord, upon the dissolution of the copartnership, deeded

the other half of the premises to Mr. Wright, his second wife joining in both deeds. It appears by the evidence that during the same time McCord had platted a considerable tract of land in Merrill into lots and blocks and sold the same to various purchasers for building purposes, and that in all such cases the deeds had been signed by the second wife and accepted by the purchasers as perfect conveyances. This fact, of course, cuts no figure except in the way of emphasizing the extent and publicity of McCord's business transactions and the importance of the present case.

We cannot resist the conclusion from these facts that it was the defendant's plain duty to speak if she in fact knew or ought reasonably to have known the fact that there was no valid divorce, and this brings us to the most delicate question in the case. There was in fact no valid divorce, and no proof was attempted to be made of even a formal divorce in any court or any state. Whether the newspaper notice to which the defendant testifies and the paper which McCord afterwards threw in her lap really emanated from any court in Utah or elsewhere does not appear. There were certainly no proceedings in Wisconsin, and both parties continuously resided in Wisconsin, so it is clear that no decree of any court in Utah could have any validity. Now it is claimed by the defendant that she believed that the supposed divorce was a valid divorce and hence that she cannot be charged with the duty of proclaiming it invalid. If she believed it valid and her ignorance of its invalidity was not culpable under the circumstances, this conclusion is doubtless correct; but did she believe it to be valid? In the first place, it is worthy of remark that if she was ignorant her ignorance was largely wilful and deliberate. The evidence shows that she paid no attention to the summons in the newspaper; she did not preserve or even examine the paper which McCord gave her and called a divorce; she made no inquiries, asked no questions, took no advice; but on her own statement acquiesced without

a struggle or a word in a decree which separated her forever from the husband of her youth and the father of her children, though confessedly she had been a faithful wife and given her husband no cause for complaint. Apparently she deliberately determined to let her husband go without objection, whatever the nature of the supposed divorce proceedings might be. But it is very certain from the evidence that she thought the divorce invalid from the very start. She herself testifies that she felt the divorce was not legal, that it seemed to her that he had no right to marry any one else, and that her relatives knew that she thought the divorce was not legal. There is also evidence by other parties that she so stated at the time. This is partially explained or modified by other testimony given by her to the effect that she didn't know but what his divorce was legal, and that she thought he wasn't a man who would marry again so openly unless there was something in the divorce. If the testimony ended here it might be difficult to say that a woman unlearned in the law should be held to be charged with knowledge of the invalidity of the supposed divorce, but there is other testimony quoted at length in the statement of facts which seems to us quite conclusive. In this testimony she practically says that the *only* reason why she didn't make him trouble and insist on her rights was because "he didn't like the thing to be made public; he wished I wouldn't do anything; he might be arrested, in prison, and didn't want anything like that to happen; didn't want me to stir up scandal or disgrace our children." No inference is possible from this testimony except the inference that McCord admitted to her that there was no valid divorce and threw himself upon her mercy. In addition to this, the testimony of the daughter of the parties, who was about thirteen years old and living with her mother at the time of the separation, is very significant, as follows:

"I never for a moment thought that my father had a divorce that could be legal. . . . The common understanding

at Shawano was that my father was not divorced; I don't know as my mother knew of that common understanding. She never thought he was herself, probably. I don't know what she thought. I don't know that she ever told us anything about it; we may have simply talked it as a matter of course, and there was very little said."

The same witness was later asked, "Do you know why your mother made no objection to the second marriage?" and replied, "Well, she didn't do it on account of her family principally—not of that temperament. . . . She didn't care to have any more publicity." Again, the same witness said, when asked when she first learned the facts that made her think her father's marriage to Miss Space was not legal, "I knew it *always* as well as I was convinced in my own mind."

This testimony of both mother and daughter bears every impress of truth. Fully convinced of the outrage that had been done to her as a wife and that she could send her husband to prison for it, she yet determined for the sake of her family to bear the burden in silence and make no complaint. It was one of those acts of self-denial which women are frequently doing for the sake of others who are dear to them. If McCord himself, the principal offender, could be made to bear the consequences, and make good to the defendant as far as money can make good, for her sufferings and humiliation, exact justice would be done, but this is impossible. The claim here is against people innocent of wrong themselves, who have dealt with McCord with the honest belief that his marriage to Miss Space was legal. The question is one which is always difficult and sometimes distressing, namely, which of two absolutely innocent parties shall suffer?

It appearing to us clearly that *Mrs. McCord* was convinced from the beginning of the invalidity of the supposed divorce, we think that the well understood principles of estoppel must be held to apply. Knowing that her husband had publicly

married another woman, was proclaiming her as his wife, was transacting business every day with people who supposed the second marriage was legal and valid, she allowed this state of affairs to continue without a word of protest. It seems to us she should then have spoken if she would deal fairly with her fellowmen.

There are authorities which hold that a woman will not estop herself from claiming dower by silence under circumstances somewhat similar to those present here. Among such authorities are *Martin's Heirs v. Martin,* 22 Ala. 86; *Reel v. Elder,* 62 Pa. St. 308; *Cruize v. Billmire,* 69 Iowa, 397, 28 N. W. 657; and *Cazier v. Hinchey,* 143 Mo. 203, 44 S. W. 1052.

The greater weight of recent authority, however, supports the position here taken. *De France v. Johnson,* 26 Fed. 891; *Norton v. Tufts,* 19 Utah, 470, 57 Pac. 409; *Hoig v. Gordon,* 17 Grant Ch. (Up. Can.) 599; *Nuhn v. Miller,* 5 Wash. 405, 31 Pac. 1031, 34 Pac. 152; *Sadler v. Niesz,* 5 Wash. 182, 31 Pac. 630, 1030; *Gilbert v. Reynolds,* 51 Ill. 513; *Brown v. Kerns,* 6 Ohio N. P. 68.

It follows that the judgment below was right and must be affirmed.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied February 21, 1911.

EGGLESTON, Appellant, vs. SWARTZ and others, Respondents.

November 17, 1910—February 21, 1911.

Wills: Construction: Life estate or fee? Validity: Suspension of power of alienation: Mortgages.

1. A testator seventy-five years of age, in failing health, who by his original will had given all his property to his wife, twelve years his junior, executed a codicil in which he devised to each of his four living children specific tracts of land, all "to be subject to the use, occupation, and control of my wife . . . during the term of her natural life. In case of the death of any of my said children without issue remaining alive, the land . . . devised to him or her is to go to his or her brothers or sisters equally and in equal shares, but in case of them having children then living the same shall go to and belong to such children of such devisees respectively in equal shares." *Held*, that the "death of any of my said children," referred to, did not mean death during the lifetime of the testator or of his widow, but death at any time; and that the estate devised to each of the testator's children terminated at his or her death, with remainder over to his or her children then living, if any, and if none then to his or her brothers and sisters.
2. Such devises did not suspend the power of alienation for more than two lives in being, since under no possible contingency could there be a suspension of the power to convey any tract in fee longer than during the life of the widow and the life of a child of the testator.
3. Since the estate of testator's children terminated at death, a mortgage executed by one of them in his lifetime was subject to the same limitation, and upon the death of such mortgagor the land passed to his children then living, free from any claim of the mortgagee.

VINJE, J., WINSLOW, C. J., and TIMLIN, J., dissent.

APPEAL from a judgment of the circuit court for Fond du Lac county: CHESTER A. FOWLER, Circuit Judge. *Affirmed.*

This is an action to foreclose a real-estate mortgage given by Samuel Swartz to secure certain promissory notes. The mortgage on its face attempts to convey a fee of the real estate described. Samuel Swartz had an estate in these prem-

ises under the will of his father, Peter Swartz. The character of this estate is an issue in this action. Samuel Swartz died intestate, and the action is brought against his widow and his two children as his heirs at law. The children claim to be the owners of the land embraced in the mortgage.

The court found that the action was seasonably brought, that the notes involved were given for a valuable consideration, and that they had never been paid.

Besides the issues thus decided in plaintiff's favor, the two children of Samuel Swartz raised the question of title, claiming title to the premises under the last will and testament of their grandfather, Peter Swartz. By the original will of Peter Swartz, executed June 16, 1874, all of his property was given to his wife. On May 22, 1880, he changed his will by a codicil, bequeathing legacies to certain grandchildren and making provision for each of his four living children by devising to them separately certain specified tracts of land. The provisions appertaining to these gifts of lands are alike in terms and conditions and the limitations imposed thereon apply to each one. The following is the devise to his son Samuel, which is specifically involved in this action, the conditions being the same as to all of them:

"I do give, devise and bequeath unto my son, Samuel Swartz, the southwest quarter of the southwest quarter of section No. four and the west half of the northwest quarter of section No. nine, all in said town of Metomen, county and state aforesaid,—containing 120 acres of land."

These devises of lands to the children are followed by the following provisions:

"All the lands above devised to be subject to the use, occupation and control of my wife, Barbara Swartz, and the rents, issues and profits thereof to belong to her for and during the term of her natural life."

"In case of the death of any of my said children without issue remaining alive the land hereinabove bequeathed and

devised to him or her is to go to his or her brothers and sisters equally and in equal shares, but in case of them having children then living the same shall go to and belong to such children of such devisee respectively in equal shares."

It appeared on the trial that Peter Swartz was nearly seventy-five years of age when he executed the codicil to his will; that his wife was then sixty-two years of age; that he had been afflicted with a serious disease for the previous seventeen years; that he died the following January; that two of the testator's children were then dead, having left children who were then living; that the four living children were all married, and two of them had children and two had none; that his son Samuel was then living on the farm involved in this action but was estranged from his wife, and they had no children; that by another marriage, subsequent to his father's death, Samuel Swartz became the father of two children who survived him and who are the defendants in this action, with the widow of Samuel.

The court construed the will of Peter Swartz as giving the land in question to Samuel Swartz, subject to his mother's life estate, and held that upon death of Samuel the title and interests in the land passed in fee to his children then living, and that the children of Samuel Swartz held the land free from any claims of the plaintiff. Judgment to this effect and that the complaint be dismissed with costs was entered. This is an appeal from such judgment.

For the appellant there was a brief by *Carter & Pedrick* and *Maurice McKenna,* and oral argument by *Mr. S. M. Pedrick* and *Mr. McKenna.*

For the respondents there was a brief by *Roy Reed* and *John J. Wood, Jr.,* and oral argument by *Mr. Wood.*

The following opinion was filed December 6, 1910:

SIEBECKER, J. The provisions of the will were construed by the circuit court as giving to the widow of the testator a

life estate and to each of his four children named in the will a conditional fee terminating at their death, and that the fee so devised to his four children by the will passed on the death of either of them to such children of such devisee as were then living, and in default of children to the brothers and sisters of the devisee. This construction is assailed by the appellant, the mortgagee of Samuel, upon the ground that it appears from the context of the will that the testator intended by the devise in fee of the land to each of his children, and in case of the death of either of them without issue to the other persons designated, that such death of either of his children should refer to death during the testator's lifetime. The testator at the time of making these provisions in his will was nearly seventy-five years of age, in failing health; his wife was then living, twelve years his junior, in good health; his children were then occupying the pieces of land respectively devised to them; and Samuel and his wife lived separate and had no children. The provision in question is that if either of his children die "without issue remaining alive," then the land devised to him or her should "go to his or her brothers and sisters equally," but, in case of such child dying leaving "children then living," it should go to such children in equal shares. In both of these conditions the testator uses language which clearly tends to show that he had in mind a purpose to have his lands go to such persons of the classes named by him as might be living when the contingency happened, namely, the death of either of his said children to whom he devised the land. The phrase "without issue remaining alive," in case of the death of either child, naturally imports, in the connection in which it is used, that he referred to their deaths at any time. This phrase points directly to a time when a death of either of the testator's children might occur. It is also more definite in import than the phrase "without issue" used in such connection. This latter phrase, when so used, is held to apply to and to control a situation as here presented under

sec. 2046, Stats. (1898), as stated in *Webber v. Webber,* 108 Wis. 626, 631, 84 N. W. 896, namely, "when a remainder shall be limited to take effect on the death of any person without heirs, or heirs of his body, or without issue, the words 'heirs' or 'issue' shall be construed to mean heirs or issue living at the death of the person named as ancestor." The latter part of the clause of the will here presented, namely, "but in case of them having children then living," clearly refers to the same event, namely, the time of death of either devisee, and must be held to refer to the same time as the preceding clause. The import of this condition in the will, when applied to the circumstances of the testator at the time of making it, supports the claim that the testator had no intention of declaring that the contingency upon which his grandchildren were to take, namely, the death of the primary devisee, was a death of any of his children occurring before his own. His expectation of outliving any of them seemed slight under the circumstances, and he would naturally not expect to accomplish his object by making his own death the condition for transmitting his land. That this was his purpose is emphasized by the conditions of the gift which includes afterborn children within this class. These features of the will are sufficient to show that the testator intended to dispose of his estate by giving his widow the use and income thereof during her life, and to each of his children a conditional fee with a remainder over to the children of each of such devisees as were living at the death of their ancestor, with the contingency, in case either of such devisees died without leaving any children surviving him or her, that the remainder should then go over to his or her brothers and sisters in equal shares. Under these provisions of the will the children of Samuel living at the time of his death constituted the class designated in the will to whom was given the real estate devised to Samuel. The devise to Samuel in fee was limited by the gift over to his children, or, if he should leave no children surviving him,

then to his brothers and sisters. Upon Samuel's death, under the facts shown, his children took title in fee-simple absolute under the testator's will. This result excludes the idea that the death referred to in the clause under consideration referred to a time within the life of the testator's widow, to whom was given the first life estate in the premises. Cases bearing on the propositions involved in the foregoing considerations are: *Webber v. Webber,* 108 Wis. 626, 84 N. W. 896; *Chesterfield v. Hoskin,* 133 Wis. 368, 113 N. W. 647; *Littlewood's Will,* 96 Wis. 608, 71 N. W. 1047; *Lovass v. Olson,* 92 Wis. 616, 67 N. W. 605; *Vanderzee v. Slingerland,* 103 N. Y. 47, 8 N. E. 247; *Hennessy v. Patterson,* 85 N. Y. 91; *Buel v. Southwick,* 70 N. Y. 581; *Tyson v. Tyson,* 96 Wis. 59, 71 N. W. 94.

The estates created by the will do not suspend the absolute power of alienation for more than two lives in being at the creation thereof. As declared in *Tyson v. Tyson, supra:*

"The principle is that, in order to make the future estate valid, the suspension of the power of alienation must under all circumstances terminate at or before the termination of the second life. It is not sufficient that it may so happen. It must so happen in every possible contingency."

The statute is that "such power of alienation is suspended when there are no persons in being by whom an absolute fee in possession can be conveyed." Sec. 2038, Stats. (1898). Applying these rules to the facts of the instant case, we find that under the conditions imposed on the estates in land by the will there can be no absolute conveyance of the fee during the life of Samuel, but that at his death suspension of the power to alienate terminates in every possible contingency, because those to whom the fee is given take it subject only to a possible life estate of the testator's widow. She and Samuel were the only two persons in being at the creation of the estate in remainder in fee simple who had any interest in the land prior to the children of Samuel, to whom was

given this future estate, dependent upon these precedent estates of the widow and the son Samuel. In no event, therefore, could there be a suspension of the power to convey this property in fee-simple absolute under the provisions of the will for a longer period than that of the life of the testator's widow and of his son Samuel. This satisfies the statute then in existence. *Becker v. Chester,* 115 Wis. 90, 91 N. W. 87, 650; *Saxton v. Webber,* 83 Wis. 617, 53 N. W. 905; *Webber v. Webber, supra; Nellis v. Nellis,* 99 N. Y. 505, 3 N. E. 59; *Buel v. Southwick, supra.*

The circuit court awarded the correct judgment.

By the Court.—Judgment affirmed.

The following opinion was filed December 10, 1910:

VINJE, J. (*dissenting*). I am unable to agree with the majority of the court in reaching the conclusion that there was only a life estate devised to each of testator's children with a remainder in fee, upon the death of the devisee, to his issue then living, if any, and if none, then to his brothers and sisters, subject, of course, to the life estate of testator's widow. I construe the will to devise an estate in fee, subject to the life estate of the widow, to each of testator's children, and am of the opinion that the devises in the last paragraph of the will are substitutionary ones, providing where the title shall go in the event a devisee dies before the testator does. We all agree that the devises in the body of the will are absolute and convey the fee unless a contrary intent appears from the last two paragraphs thereof taken in connection with the circumstances under which the will was made.

Sec. 2206, Stats. (1898), provides that "every grant of lands or any interest therein shall pass all the estate or interest of the grantor unless the intent to pass a less estate or interest shall appear by express terms or be reasonably implied in the terms of such grant." This section has been held

applicable to wills (*Baker v. Estate of McLeod,* 79 Wis. 534, 48 N. W. 657), and it must be deemed at least equivalent to a rule of construction, raising a presumption that the whole title passes where an intent to pass a less estate does not appear by express terms or is not necessarily implied in the terms of the grant. It cannot be said that the intent to pass less than the fee appears by express terms in the will under consideration. Neither is it necessarily implied in the terms thereof; for it is a familiar rule of construction of wills that where there is an absolute devise to one, and in the event of his death without issue, to another, it means a death before that of testator. In other words, it is only a substitutionary devise, and if the first devisee survives the testator he takes the fee. *Lovass v. Olson,* 92 Wis. 616, 67 N. W. 605; *Fowler v. Ingersoll,* 127 N. Y. 472, 478, 28 N. E. 471; 2 Jarman, Wills (5th ed.) 759. True, as stated in *Korn v. Friz,* 128 Wis. 428, 107 N. W. 659, this is but a rule of construction, and "yields readily to anything in words or context to indicate a different intention of the testator." But the difficulty is there seems to be nothing in this will in "words or context" to indicate a different intention on his part. For that reason recourse is had, and properly so, to facts outside the instrument itself to support the construction placed upon the will by the court. It is said the testator was old and afflicted with an incurable disease, while his children were in good health and likely to survive him, and hence he could not have meant their death before his own. But he had already suffered seventeen years from his incurable disease. Who could tell how much longer he might suffer, or who could tell where death might first strike? Our tenure of life, be we old or young, sick or well, is so uncertain that it need create no surprise to find even an infirm man seventy-five years of age contemplate the contingency that he may survive some of his children and make suitable provision therefor. Indeed, it seems far less surprising than that a father should, without any apparent

reason whatsoever, be willing to place the fee title in his minor grandchildren, but be unwilling to trust any one of his four adult children therewith—unless it go to them after a brother or sister has died without issue. In that event they take the fee. Can it be seriously maintained that the testator intended such an anomalous result? Let us see what may be the consequences of such a construction. If one child dies without issue the others take the fee. If another dies without issue, the land received from the father through the first child does not pass to the survivors, while that devised directly to him does pass. It seems incredible that the testator should have contemplated and intended such a result. There is consistency in devising a life estate to one and remainder in fee to another, but there is none in devising a life estate to a class absolutely and a fee to the same class contingently, and the testator should not be charged with such inconsistency unless the language used by him is incapable of any other construction. If his scheme had been to give his children a life estate only and his minor grandchildren the fee, he would have provided that in the event of the death of any child without issue the fee should go to the surviving grandchildren instead of to the surviving brothers and sisters. It appears that he was fully capable of unmistakably devising a life estate by will, for he did so, in apt words, to his widow. He could have done it just as easily and clearly to his children. He did not, and as I believe, because he did not intend to do so.

For these reasons I am unable to persuade myself that the testator by the last paragraph in the will intended to cut down the estate already granted to his children from a fee to a mere life estate; but that, on the other hand, out of extra caution perhaps, he added substitutionary devises so that if any devisee should die before he did the will would dispose of the share of the real estate devised to him.

I agree with the court in holding that the will does not violate the rule against perpetuities.

WINSLOW, C. J. I concur in the views of Mr. Justice VINJE.

TIMLIN, J. I concur in this dissent rather than in the majority opinion. I have, however, reasons for my dissent not herein expressed.

A motion for a rehearing was denied February 21, 1911.

TASSE, Appellant, vs. KINDT, Respondent.

November 19, 1910—February 21, 1911.

Real-estate brokers: Middlemen: Commissions from both parties.

A broker who undertakes merely to procure a purchaser for land at a price fixed by the seller is in reality only a middleman and is entitled to the agreed commission for such service even though, by an agreement unknown to the seller, he is also to receive a commission from the purchaser. SIEBECKER, J., dissents.

APPEAL from a judgment of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Reversed.*

This action was brought to recover a commission of $400 for services rendered by plaintiff in procuring for the defendant a purchaser of certain real estate owned by the defendant. The defendant denied generally the allegations of the complaint. The action was here on a former appeal. 125 Wis. 631, 104 N. W. 703. The case was again tried in the court below and the following verdict returned:

"(1) Was it agreed between the plaintiff and defendant on or about August 15, 1899, that if a purchaser of the defend-

ant's eleven acres should be procured by the plaintiff at the highest price obtainable and satisfactory to said defendant, that the defendant would pay the plaintiff two per cent. commission upon the amount obtained? *A.* Yes.

"(2) If you answer 'Yes' to question No. 1, then answer: Was such agreement modified on or about August 20, 1902, by the defendant fixing the price at which the plaintiff should offer said property, being a tract of ten acres, at $2,000 per acre? *A.* Yes.

"(3) Was said eleven acres sold by defendant to Read and Neacy as an entire piece, and at the uniform price of about $1,909.09 per acre? *A.* Yes.

"(4) Did said plaintiff procure Read and Neacy as purchasers for ten acres of said property ready, willing, and able to purchase said ten acres at $2,000 per acre? *A.* Yes.

"(5) Did the plaintiff, prior to August 20, 1902, accept employment at compensation from T. J. Neacy and Walter Read to purchase the property mentioned in the complaint from the defendant for them? *A.* Yes.

"(6) If you answer question No. 5 'Yes,' then answer: Did the plaintiff inform the defendant that he had an agreement with Read and Neacy to receive a commission from them for negotiating the sale with the defendant? *A.* No.

"(7) If you answer 'Yes' to question No. 5, did such employment continue until about September 10, 1902? *A.* No.

"(8) Was the plaintiff in the employ of both Read and Neacy and the defendant at the time he was endeavoring to effect a purchase and sale of the property? *A.* No.

"(9) If the court shall be of the opinion that the plaintiff is entitled to recover, at what sum do you assess his damages? *A.* To be decided by the court."

Both parties moved for judgment on the verdict. The motion of the defendant for judgment on the verdict also included a motion that the answer of the jury to the first question of the special verdict be changed from Yes to No; that the answer of the jury to the second question be changed from Yes to No; that the answer of the jury to the fourth question be changed from Yes to No; that the answer of the jury to the seventh question be changed from No to Yes; and that

the answer of the jury to the eighth question be changed from No to Yes. On such motion the court changed the answer to the seventh question from No to Yes, and the answer to the eighth question from No to Yes, and denied defendant's motion to change answers to other questions in the special verdict. The court denied plaintiff's motion for judgment on the verdict, and ordered judgment in favor of the defendant dismissing the plaintiff's complaint with costs. Judgment was entered accordingly, from which this appeal was taken.

Fred Doering, for the appellant.

For the respondent the cause was submitted on the brief of *J. M. Clarke.*

The following opinion was filed December 6, 1910:

KERWIN, J. By the answers to the first, second, and fourth questions of the special verdict as found by the jury, which the court below refused to change, it is established that it was agreed between plaintiff and defendant on or about August 15, 1899, that if a purchaser of the defendant's eleven acres should be procured by the plaintiff at the highest price obtainable and satisfactory to the defendant, the defendant would pay plaintiff two per cent. of the amount obtained as commission, and that this agreement was modified on or about August 20, 1902, by the defendant fixing the price at which the plaintiff should offer defendant's property, being a tract of ten acres, at $2,000 per acre, and that the plaintiff did procure purchasers for said ten acres who were ready, willing, and able to purchase the same at $2,000 per acre. These findings of the jury are supported by the evidence, and alone are sufficient to entitle the plaintiff to recover independent of other findings in the special verdict, under the established rule of this court. *Kilpinski v. Bishop,* 143 Wis. 390, 127 N. W. 974; *Donohue v. Padden,* 93 Wis. 20, 66 N. W. 804; *Barry v. Schmidt,* 57 Wis. 172, 15 N. W.

24; *Stewart v. Mather,* 32 Wis. 344, 355; *Orton v. Scofield,* 61 Wis. 382, 21 N. W. 261. Under the modified contract, as found by the jury, the contract of the plaintiff with the defendant was a specific one, namely, to procure a purchaser able, ready, and willing to pay $2,000 per acre for ten acres of the land. The price was fixed by the defendant and the services to be performed specific, upon the performance of which plaintiff was entitled to his compensation. The fact that plaintiff had a contract with the purchaser for a commission in no manner conflicted with his duty to the defendant. This rule is recognized by this court in the cases above cited as well as by other courts. *Mullen v. Keetzleb,* 7 Bush, 253; *Rupp v. Sampson,* 16 Gray, 398. Of course if the plaintiff occupied a position which required diligence in obtaining as high a price for the defendant's land as possible, or if the contract between the parties were such as to render the contract of the plaintiff with the purchaser at variance with his duty to the defendant, a very different question would be presented. Both contracts could not stand together, because the two engagements would be inconsistent. This rule was aptly stated by this court on the former appeal (125 Wis. 631, 104 N. W. 703), at page 633:

"An agent who undertakes the duty of making a sale for another, or performing a duty in that connection involving diligence in promotion of the employer's interest, cannot recover commission if, without the seller's knowledge, he also be employed upon compensation to work in the interest of the purchaser."

This rule is relied upon by counsel for respondent on this appeal, but it is inapplicable. On the former appeal there was a general verdict, and the jury might well have found under the original contract that the plaintiff was to procure a purchaser at the best price obtainable, and of course under such an agreement plaintiff could not accept compensation from the purchaser and at the same time recover from the

seller. But in the present case the jury found specifically that the original contract had been modified, and that the defendant had fixed his own price at $2,000 per acre, and the only duty which plaintiff owed defendant was to produce a purchaser able, ready, and willing to pay $2,000 per acre. When he had done this he had performed his contract with defendant, and was entitled to his commission regardless of any contract which he had with the purchaser. *Kilpinski v. Bishop, supra; Donohue v. Padden, supra.* Where the character of the employment of the agent is such that compensation from the purchaser cannot affect his fidelity in the performance of his duty to the seller, as for example where he is a mere middleman, or employed only to produce a purchaser at a fixed price, the rule that he cannot act for both parties does not apply. *Tasse v. Kindt,* 125 Wis. 631, 104 N. W. 703. It follows, therefore, that the fact found by the jury to the effect that prior to August 20, 1902, plaintiff accepted employment at compensation from Neacy and Read is not material, since under his specific contract with the defendant, as found by the jury, he was at liberty to do so. The distinction is clearly drawn in the decisions in this court heretofore referred to. In *Stewart v. Mather,* 32 Wis. 344, at page 355, Chief Justice DIXON, speaking for the court, said:

"A broker whose undertaking merely is to find a purchaser at a price fixed by the seller, or at a price which shall be satisfactory to the seller when he and the purchaser meet, is in reality only a 'middleman,' whose duty is performed when the buyer and seller are brought together, and as to whom the policy of the law which excludes double compensation has been considered inapplicable."

To the same effect is the late case of *Kilpinski v. Bishop,* 143 Wis. 390, 127 N. W. 974. It follows, therefore, that changing the answers to questions 7 and 8 from No to Yes in no way affected the plaintiff's right to recover, therefore

the court should have ordered judgment in favor of the plaintiff upon the verdict.

By the Court.—The judgment is reversed, and the cause remanded with instructions to the court below to render judgment for the plaintiff.

The following opinion was filed December 10, 1910:

SIEBECKER, J. (*dissenting*). The court holds that the plaintiff is entitled to recover upon the verdict as constituted after the trial court changed the jury's findings to questions 7 and 8. The decision is based on the idea which is expressed in the opinion as follows:

"The defendant had fixed his own price at $2,000 per acre, and the only duty which plaintiff owed defendant was to produce a purchaser able, ready, and willing to pay $2,000 per acre. When he had done this he had performed his contract with defendant, and was entitled to his commission regardless of any contract which he had with the purchaser."

This decision, in my opinion, disregards the cardinal ingredient of agency that in case the agent's duties to the seller, under a contract like the one involved here, conflict with those of the buyer, it is illegal. The rule of law is that an agent employed by the owner of real estate to sell the same cannot accept employment from a prospective purchaser thereof if the duties of such employments conflict. The rule is founded on the accepted judgment of mankind, and is based on the idea that a person cannot faithfully serve two masters at the same time when the duties toward the two are necessarily antagonistic. The result of the adjudications on the subject is well expressed and formulated as follows:

"One who employs a broker to find a customer to exchange real estate with him has the right to assume that he is acting solely in his interest, and is not to receive a commission from the customer. If the one principal employing him knows that he is employed by the other principal, then both he and

the broker are guilty of wrong committed against the other principal, and the law will not enforce an executory contract entered into in fraud of the rights of the first employer. . . . 'The transaction itself is void as against public policy and good morals, and both parties thereto being *in pari delicto,* the law will leave them as it finds them.'" 2 Clark & Skyles, Agency, § 765 (*a*).

I cannot conceive how the duties of plaintiff under the respective employments of defendant and the purchasers can be treated as not conflicting. It was declared by this court:

"When an agent is thus employed by one party to sell and by the other to purchase, and is vested with any discretion in the negotiation, his duties are in conflict and in respect to adverse interests, and he cannot fairly serve both parties." *Barry v. Schmidt,* 57 Wis. 172, 15 N. W. 24; *Stewart v. Mather,* 32 Wis. 344; *Meyer v. Hanchett,* 43 Wis. 246; Mechem, Agency, § 972.

The only permissible exception to such double employment is when the agent is acting as a middleman, and is upon the ground that in this relation he contracts to exercise his skill and influence for both parties for bringing them together, but that he is indifferent between them as to the negotiations. *Tasse v. Kindt,* 125 Wis. 631, 104 N. W. 703, and cases cited above. I am unable to agree to the opinion that the subsequent employment of the plaintiff by Neacy and Read, which was unknown to the defendant, made plaintiff a middleman between them and the defendant. Plaintiff's employment by the purchasers was to negotiate in their interest and against that of the defendant for a reduction of the price of defendant's land to less than the $2,000 per acre which he had agreed to obtain for the defendant. These two employments necessarily put the plaintiff in a position wherein he was to use his skill and influence to promote the adverse and conflicting interests of his two employers. This he could not legally do. The fact that the defendant demanded a fixed price and that plaintiff claims to have obtained it finally,

does not purge his double employment of its inherent illegality.

I am, however, of the view that the trial court was not warranted under the evidence in changing the answers to questions 7 and 8 of the special verdict, and that the verdict of the jury should have been approved. Such verdict would entitle plaintiff to recover, for his employment by the purchasers had wholly ceased before he made the special contract with the defendant in August, 1902, under which the jury found that he secured the purchasers at the stipulated price.

A motion for a rehearing was denied February 21, 1911.

DAMMAN, Appellant, vs. DAMMAN, Respondent.

November 19, 1910—February 21, 1911.

Appeal: Review: Lack of specific findings: Reversal: New trial: Evidence: Divorce.

1. Failure of the trial court to make such findings of fact as are required by sec. 2863, Stats. (1898), is error, but does not necessarily lead to reversal.
2. General findings of the trial court are not within the rule that the decision of such court with respect to disputed matters of fact will not be disturbed on appeal unless against the clear preponderance of the evidence.
3. In the case of general findings the appellate court may affirm the judgment if clearly supported by preponderance of the evidence; reverse it if not so supported, ordering judgment in accordance with what appears to be the preponderance; or, if that course seems to present peril of injustice, may remand for further trial and findings.
4. A divorce action in which many witnesses testified on each side and the conflict in their testimony was such as hardly to be accounted for except on the theory that those on the one side or

the other were lying, is *held* to be a case in which this court should have the full benefit of specific findings by the trial court, and should not attempt to determine, in the first instance, from the printed record whether or not the preponderance of evidence sustains the judgment.

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Reversed.*

This is an action for divorce. The complaint charges the defendant with cruel and inhuman treatment of the plaintiff, and alleges coarseness and vulgarity on the part of the defendant, that she associates with low characters and attends questionable places, but does not charge actual adultery. The answer is a general denial, with countercharges of the same general character against the plaintiff. At the close of the testimony the court said:

"The first principle governing the law of equity cases, and particularly divorce cases, is this, that the party seeking relief must come into court with clean hands. This is not such a case. Further comment by the court is not necessary. The divorce is denied."

The court found that the parties were husband and wife; the age of the respective parties; the fact that they had resided within the state for more than one year before the action was begun, and that no issue resulted from the marriage. The court further found that the plaintiff "has not shown himself entitled to a divorce and has not come into equity with clean hands, and the complaint is therefore dismissed." From the judgment entered upon the findings the plaintiff appeals, and assigns substantially two grounds of error: (1) The judgment should be reversed because the court failed to make specific findings of fact. (2) If the plaintiff was guilty of misconduct his lapses had been condoned by the defendant.

Andrew Gilbertson, for the appellant.

W. H. Timlin, Jr., and *Patrick W. Dean,* for the respondent.

The following opinion was filed December 6, 1910:

BARNES, J. The first question we are called upon to consider is whether the judgment should be reversed because of the failure of the trial court to make specific findings of fact covering the controverted questions which were litigated. Sec. 2863, Stats. (1898), requires the trial judge to state in his decision the facts found by him. That the convenience of this court would be subserved by complying with the statute in regard to making specific findings is obvious. That the interests of litigants may suffer in consequence of failure to make such findings should be just as obvious to those familiar with our decisions upon the subject. The cases will be found cited in *Young v. Miner,* 141 Wis. 501, 504, 124 N. W. 660; *Farmer v. St. Croix P. Co.* 117 Wis. 76, 93 N. W. 830; and *Brown v. Griswold,* 109 Wis. 275, 85 N. W. 363. The latest case bearing upon the subject is *Jansen v. Huerth,* 143 Wis. 363, 127 N. W. 945; and this case, as well as *Closuit v. John Arpin L. Co.* 130 Wis. 258, 110 N. W. 222, and *Brown v. Griswold, supra,* furnish instances where judgments were reversed largely because of the failure of the court to make specific findings.

It has frequently been held that while it is error not to make such findings as are required by sec. 2863, Stats. (1898), it is not necessarily reversible error, but that general findings are not within the rule that the decision of the trial court with respect to disputed matters of fact will not be disturbed on appeal unless against the clear preponderance of the evidence. *Chippewa B. Co. v. Durand,* 122 Wis. 85, 99 N. W. 603; *Farmer v. St. Croix P. Co.* 117 Wis. 76, 81, 93 N. W. 830, and cases cited; *Closuit v. John Arpin L. Co., supra.*

The latter case presents as clearly and definitely as any the attitude of this court toward general findings. It is said that such findings leave the court in a predicament where it

may pursue one of three courses: "To affirm the judgment if clearly supported by preponderance of the evidence; to reverse if not so supported, ordering judgment in accordance with what appears to this court to be the preponderance; or, if that course seems to present peril of injustice, to remand for further trial and findings."

Naturally, if this court undertakes to determine which way the evidence preponderates, it must take the testimony as it finds it in the printed record, and very often this cannot be done with safety. The case before us presents a situation where there is a conflict in the evidence of such a character that it is hardly possible to account for it on any other hypothesis than that the witnesses on the one side or the other were lying. It may well be that they were doing so on both sides. It is, of course, axiomatic that the preponderance of the evidence in a case does not necessarily rest in favor of the party who has produced the greatest number of witnesses to testify to essential facts. The looks, the voice, the attitude, the general demeanor of a witness may convince a trial court that he is untruthful, while the printed record may put his testimony in as favorable a light before this court as that of a witness in whose candor and honesty the trial court justly and properly placed implicit reliance. So the cases are not numerous in which this court may in effect perform the functions of a trial court in weighing evidence and determining where the preponderance rests.

A goodly part of the evidence in the case before us was given by moral degenerates. A large number of witnesses were sworn on either side and there was much conflict in the testimony on material points. The case is essentially one where this court is entitled to the full benefit of specific findings by the trial court, to the end that we may know what his views are on the essential questions that were litigated. We do not think it is one where this court can or should attempt to determine from the record whether the conclusion of the

trial court is supported by the mere preponderance of the evidence or not. The case presents the third situation referred to in *Closuit v. John Arpin L. Co., supra.* We can well believe that the trial court was thoroughly nauseated with the disgusting character of the evidence presented, and that the case was therefore summarily disposed of. But either of the parties had the lawful right to appeal to this court from an adverse judgment, and to have the case fully and fairly considered in this court, and to give it such consideration it is essential that specific findings of fact be made covering the material controverted issues in the case.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded with directions to the trial court to take further evidence in the case, if it be deemed necessary or advisable so to do, and to make findings of fact and conclusions of law upon the evidence before it, in accordance with the requirements of sec. 2863, Stats. (1898).

TIMLIN, J., took no part.

The respondent moved that the mandate be modified so that the reversal should be without costs. The motion was granted February 21, 1911.

PORTMAN, Respondent, vs. CAPPON, Appellant.

November 19, 1910—February 21, 1911.

Master and servant: Injury: Defective machinery: Accident: Evidence.

In an action for injuries to a servant, caused by a dowel pointer flying from the machine at which he was working, the evidence is *held* to show that the tool did not fly from the machine because of any improper construction or want of repair thereof; that plaintiff's claim that the nut which secured the tool, after

being screwed on tight, came off during the operation of the machine, was not supported by the evidence and was contrary to physical laws; and that, even if it were conceded that the nut did come off, it was a pure accident, for which defendant was not responsible.

APPEAL from an order of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Reversed.*

Action for personal injuries. Plaintiff was twenty-four years old and a carpenter by trade, of foreign birth, having been in this country but three and one-half years, could not speak English, and was unfamiliar with machinery. Defendant was the owner of a factory wherein were operated certain machines in connection with his business of manufacturing sash, doors, cabinets, and window frames. Plaintiff was employed by the defendant on the 10th day of May, 1907, and did various work about the factory. About a month after he was employed, at the direction of defendant plaintiff was set to work at what is called a "dowel machine," designed and operated for the purpose of trimming the edges or ends off of dowels or small pieces of wood, and had worked at it about three hours two or three days before the accident. The machine consisted of a piece of shafting of iron or steel, resting on a wooden framework about four feet above the floor. At one end of the shaft was a round opening a little less than one-half inch in diameter, extending into the shaft to a depth of two inches from the end. The diameter of the hole increased slightly with its depth; that is, the diameter was larger at the inner end of the hole than at its opening at the end of the shaft. There were four slits in the end of the shaft about one-sixteenth of an inch wide, extending in as far as the hole, thus dividing it into four equal prongs. These prongs had a graduated thread on the outside for about an inch and one-half from the end, on which there was a nut to be used in making the opening larger or smaller by turning the nut with a wrench, the opposite end of the shaft

being set in the framework. The diameter of the shaft or chuck increased slightly from the end, so that, as the nut was screwed on, the inside opening would be diminished and the prongs would firmly engage the shank of the tool inserted. The diameter of the dowel pointer decreased slightly from the end, and, therefore, when fully inserted its whole shank would closely fit the opening. Then when the nut was screwed on tight, the opening at the end of the chuck would be smaller than the inner end of the shank of the dowel pointer, and it could not come out as long as the nut was on. The power was conveyed to the shaft by a belt running from another shaft near the floor, where there was a live and dead pulley and a belt shifter. The shaft revolved at a speed of about 2,000 revolutions per minute, which speed could not be checked or reduced except by entirely cutting off the power. In the opening in the end of this shaft were inserted different tools, according to the kind of work to be done, which were fastened by screwing the nut toward the framework, and the tool, while so held, would of course revolve with the same rapidity as the shaft.

Plaintiff's work and duty required him to press pieces of wood against the revolving tool in the shaft. On the day he was injured plaintiff was engaged in operating the above described machine, and, while the shafting was revolving, the dowel pointer inserted therein in some manner got loose and flew therefrom, struck plaintiff, and permanently destroyed the sight of his left eye.

At the close of the evidence defendant moved the court to direct a verdict in his favor, which motion was granted. Thereupon plaintiff moved for a new trial, and the court made an order vacating and setting aside its former order directing a verdict in favor of defendant, and granted plaintiff's motion for a new trial, from which order defendant appealed.

For the appellant there were briefs by *Doe & Ballhorn*, and oral argument by *J. B. Doe*.

For the respondent there was a brief by *Glicksman, Gold & Corrigan,* and oral argument by *W. L. Gold.*

The following opinion was filed December 6, 1910:

VINJE, J. The plaintiff alleged a want of repair of the machine and an improper construction of the chuck thereof, by reason of which the dowel pointer could not be securely fastened, but would become loose and be thrown therefrom when the shafting revolved. There was no evidence that any part of the machine other than the chuck and dowel pointer was out of repair, and the only evidence as to these parts being out of repair was that the shank of the latter was a trifle worn. But it is evident from the description of the chuck, and shank of the dowel pointer, set out in the statement of facts,—showing that the diameter of the shank increased toward the end, while that of the hole in the chuck decreased and was appreciably diminished by the screwing on of the nut,—that a slight wear of the shank would not permit it to come out when the nut was on. The chuck and dowel pointer are in evidence, and a careful examination of them shows that it is physically impossible for the dowel pointer to come out as long as the nut is on the chuck. It follows that even if the shank of the dowel pointer was a little worn, which is questionable, it did not affect its being securely held in the chuck when the nut was on.

The only witness who testified that the machine was improperly constructed, said it was so "because the chuck I do not think would be secure when held by a nut pressed back on the shaft as that nut is." "I would still say I would not think it would hold even if it had been run for ten years and it had always held the dowel." For reasons already stated, this testimony is completely nullified by the construction of the chuck, and shank of the dowel pointer, and must be disregarded. There was no other evidence of improper construction or of a want of repair of the machine. It was urged, however, by counsel for plaintiff that the nut came off

at the time of the accident and that it did so owing to a defective condition of the machine. The only evidence that could in any sense be said to support such a claim was the testimony already quoted. But testimony that the chuck would not be secure when held by a nut pressed back on the shaft falls far short of supporting the claim that the nut itself was liable to come off, or did come off, when the machine was in operation, especially in view of the undisputed fact that the shaft revolved to the left and the nut turned to the right. Under such circumstances the operation of the machine would tend to tighten, not loosen, the nut.

The plaintiff testified that a couple of hours before the accident the defendant's foreman, Schroeder, assisted him in removing a tool from the chuck that had become so securely fastened that he could not get it out; that the foreman then wrapped some paper around the shank of the dowel pointer, inserted it in the chuck, and *screwed the nut on tight.* The foreman admits that he took the tool out for plaintiff, but denies that he put the dowel pointer in. He testified that when he went away the dowel pointer was out, and the nut was lying on the frame of the machine, a little to the left and about four inches back of the end of the chuck. The testimony is that the nut was first seen in the place described by the foreman a few minutes after the accident.

Plaintiff's case must rest upon the fact that the foreman put the dowel pointer in the chuck and screwed the nut on tight, and upon the further undisputed fact that the nut was off shortly after the accident. This raises the question as to whether or not there is any evidence to sustain a finding that after the nut was screwed on tight it had come off during the operation of the machine. As we have already stated, there is no such evidence, and if there were it would be contrary to physical laws in view of the construction of the machine. But even if it were conceded that the nut did come off, there would be no liability on the part of the defendant,

for the plaintiff testified that the foreman screwed the nut on tight, and the undisputed evidence is that during an operation of over five years it had never come off before. The nut, chuck, and thread were in good repair, were not worn or loose, and if the nut came off after it was screwed on tight it was a result that no one could foresee—a pure accident for which no one was responsible. *Wickert v. Wis. Cent. R. Co.* 142 Wis. 375, 125 N. W. 943. It follows that the order of the trial court vacating the order directing a verdict for defendant and granting plaintiff's motion for a new trial was erroneous.

By the Court.—The order of the circuit court is reversed, and the cause remanded with directions to enter judgment for defendant.

A motion for a rehearing was denied February 21, 1911.

STATE, Respondent, vs. CITY OF MILWAUKEE and another, Appellants.

December 6, 1910—February 21, 1911.

Statutes: When affect rights of the state: Claims against county or city: Action by state: Pleading: Demurrer: Fines collected and not paid to state: Liability of county and city.

1. Words of a statute applying to private rights do not affect those of the state. The general business of the legislative power is to establish laws for individuals, not for the sovereign; and when the rights of the state are to be transferred or affected the intention must be plainly expressed or necessarily implied.
2. The state may maintain an action directly against a county or a city charged with detaining moneys belonging to the state, and is not obliged to pursue its remedy in the manner prescribed by secs. 676–678, 682, 683, Stats. (1898), or by provisions of the city charter, all of which relate to the collection of private claims.
3. If the complaint is bad, a demurrer to the answer may be sustained as a demurrer to the complaint.

4. In an action by the state against a county and a city, allegations of the complaint that defendants have received to the use of the state and unlawfully detain a certain sum, being the clear proceeds of fines collected, which said sum defendants were legally bound and promised to pay to plaintiff without demand according to the provisions of the constitution and statutes of the state, mean merely that the treasurers of the defendants received such fines and failed to pay them over to the state as required by the constitution and laws.
5. The county and city are not liable for such default of their treasurers, and can be held liable for the money sued for only upon a showing that they actually received it and used it for legitimate municipal purposes.

APPEALS from orders of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Reversed.*

The amended complaint alleges that at all the times hereinafter mentioned the defendant *City of Milwaukee* was and is a municipal corporation of the state of Wisconsin, situated in the *County of Milwaukee;* that the defendant *County of Milwaukee* at all times hereinafter mentioned was and is one of the county municipal subdivisions of the state;

"That heretofore, to wit, at various times on and between the first day of January, 1859, and the first day of January, 1909, the said defendants have received as the clear proceeds of fines imposed and collected within the said *County of Milwaukee,* for violations of the penal laws of said state, the sum of two hundred and twenty thousand seven hundred and thirty-two and forty-eight one-hundredths dollars ($220,732.48) to the use of the plaintiff, which said sum of money said defendants were legally bound and promised to pay to the plaintiff without demand, according to the provisions of the constitution and statutes of said state, but which said sum of money the said defendants unlawfully detain."

Then follow the amounts alleged to have been paid to and received by defendants yearly from 1859 to 1909, aggregating $220,732.48. Plaintiff alleges that said sums of money are now due and have not been paid, nor any part thereof,

and demands judgment for said sum of $220,732.48 with interest, together with costs and disbursements of this action.

The defendant *City of Milwaukee* answered setting up several defenses, and among others the statutes of limitation as follows:

"And for a further defense this defendant alleges that even though the plaintiff might have had a cause of action against the defendant as contained in said complaint, the plaintiff is barred from the prosecution of such action so far as the same is affected by section 4229, Wisconsin Statutes 1898, as amended by chapter 1 of the Laws of Wisconsin for 1905, pursuant to which such action must be commenced within ten years after the cause of action therefor has accrued, and that plaintiff did not commence said action until March 13, 1909."

The defendant *County of Milwaukee* answered, also setting up the statutes of limitation as a separate defense as follows:

"And for further defense said defendant *County of Milwaukee* alleges that if said plaintiff ever had a cause of action against said defendant *County of Milwaukee* as stated in said complaint, said plaintiff is barred from the prosecution thereof so far as the same relates to any fines or penalties collected or paid more than ten years prior to the service of the summons and complaint herein upon the defendant, as provided by section 4229 of the Wisconsin Statutes of 1898, as amended by chapter 1 of the Laws of Wisconsin for 1905."

The plaintiff demurred separately to the defenses of the statutes of limitation set up by the defendants *County of Milwaukee* and *City of Milwaukee* for want of facts sufficient to constitute a defense, and upon the hearing of the demurrer of plaintiff to part of the answer of the defendant *County of Milwaukee* said defendant demurred to the complaint for the following reasons: (1) that said complaint does not state facts sufficient to constitute a cause of action against said defendant *County of Milwaukee;* (2) that said plaintiff has not capacity to sue; and (3) that this court has no jurisdic-

tion of the action. The court below overruled the demurrer of the defendant *County of Milwaukee* to the complaint and sustained the demurrer of plaintiff to that part of the answers of the defendants *County of Milwaukee* and *City of Milwaukee* setting up the statutes of limitation. Both defendants appealed.

For the appellant *City of Milwaukee* there was a brief by *Daniel W. Hoan,* city attorney, and *W. H. Timlin, Jr.,* special assistant city attorney, and oral argument by *Mr. Timlin.*

For the appellant *County of Milwaukee* there was a brief by *Chas. A. A. McGee,* district attorney, and *Norman L. Baker,* assistant district attorney, and oral argument by *Mr. Baker.*

For the respondent there were briefs by the *Attorney General, Russell Jackson,* deputy attorney general, and *A. C. Titus,* first assistant attorney general, and oral argument by *Mr. Jackson* and *Mr. Titus.*

KERWIN, J. The defendants assign error in overruling the respective demurrers of the plaintiff to the answers of the defendants as demurrers to the plaintiff's complaint, and in sustaining such demurrers as demurrers to the answers, also in overruling the demurrer of the defendant *County of Milwaukee* to the plaintiff's complaint interposed after the answer was served and upon the hearing of the plaintiff's demurrers to the answers of defendants. The theory of the court below in overruling the demurrer of the defendant *County of Milwaukee* was that the objection that the plaintiff failed to proceed according to secs. 676, 677, 678, 682, and 683, Stats. (1898), must be taken by plea in abatement or answer or it is waived, and held that the complaint stated a good cause of action. We need not stop to determine whether the failure to comply with the foregoing sections of the statute could be waived, as held by the court below, in case the action were brought by a private party, because we are of

opinion that this statute has no application to the cause of action set up in the complaint brought by the *State of Wisconsin*. The above statutes do not, either expressly or by necessary implication, refer to the state, and it is a general rule that such statutes in general terms do not bind the state. *Milwaukee v. McGregor,* 140 Wis. 35, 121 N. W. 642; *U. S. v. Hoar,* 2 Mason, 311; *Jones v. Tatham,* 20 Pa. St. 398; Endlich, Interp. Stats. § 161; *Cole v. White Co.* 32 Ark. 45; *Gilman v. Sheboygan,* 2 Black (U. S.) 510. In *Jones v. Tatham, supra,* the court said (page 411):

"Words of a statute applying to private rights do not affect those of the state. This principle is well established, and is indispensable to the security of the public rights. The general business of the legislative power is to establish laws for individuals, not for the sovereign; and, when the rights of the commonwealth are to be transferred or affected, the intention must be plainly expressed or necessarily implied."

No reason is perceived why the foregoing rule should not apply to the instant case, and if so the state was not obliged to pursue its remedy in the manner indicated by the statutes above referred to, but could maintain an action directly against the municipalities charged with detaining the money. The rule is of ancient origin and based upon the idea that the crown is not bound by a statute unless named in it and that the law is *prima facie* presumed to be made for subjects only. Bishop, Written Laws, § 103, and cases cited. And it is presumed that the legislature does not intend to deprive the crown of any prerogatives, rights, or property unless it expresses its intention to do so in explicit terms or makes the inference irresistible. *State v. Kinne,* 41 N. H. 238; Bishop, Written Laws, § 103; *State v. Garland,* 7 Ired. L. (N. C.) 48. The English rule has been adopted in this country. In *State v. Kinne, supra,* in speaking on this subject the court said (page 241): "Such a statute would not have been made had not the rule we have stated been understood to prevail,

that the state here, like the crown in England, is not bound by the provisions of a general statute which affects its prerogatives, rights, or interests, unless expressly named." *Bennett v. McWhorter,* 2 W. Va. 441. What has already been said applies as well to the defendant city as to the defendant county, and we therefore conclude that failure to comply with the statutes referred to or the charter provisions respecting collection of claims against cities is not a bar to an action by the *State of Wisconsin.*

Respecting the position as to whether or not the complaint states a cause of action regardless of the matter before referred to, the question is reached by the plaintiff's demurrers to the answers of the defendants county and city under the familiar rule that if the complaint is bad the demurrers to the answers reach back to the complaint and may be sustained as demurrers to the complaint. *Lawe v. Hyde,* 39 Wis. 345; *Eaton v. North,* 25 Wis. 514; *State ex rel. Leiser v. Koch,* 138 Wis. 27, 119 N. W. 839. So we reach the question whether the complaint states a cause of action against the defendants.

It is true under our system of pleading and the decisions of this court that pleadings should be liberally construed. But we fail to see how under such rule it can be said that the complaint states a cause of action in the case before us. It merely charges that the defendants received the fines and detained them to the use of the plaintiff and which the defendants were legally bound and promised to pay to plaintiff without demand according to the provisions of the constitution and statutes of the state. These allegations, when read in the light of the provisions of the constitution and statutes of this state, clearly mean that the treasurers of the defendants received and detained the fines, and for that act the defendants are not liable. Under the constitution and laws of the state the fines passed into the hands of the city and county treasurers to be paid over to the state. Subd. 5, sec. 715,

Stats. (1898), makes it the duty of the treasurer of the county to transmit to the state treasurer a verified statement of all moneys received by him during the year which were payable to the state treasurer for fines, and pay to the state treasurer the amount thereof after deducting the legal fees. It is also made the duty of the city treasurer, under the law, to pay over to the county treasurer the portion of the fines belonging to the state. So such moneys received by the county or city treasurer are not the moneys of the respective municipalities, and such municipalities cannot be charged with having received or detained them except it be shown that they have used such moneys for legitimate municipal purposes; and the allegations that defendants have received such fines and are legally bound to pay without demand according to the provisions of the constitution and statutes of the state simply mean that the moneys were paid to the treasurers of the respective municipalities and that they have failed to account or pay as required by law. For such default upon the part of the treasurers the municipalities are not liable. *Smith v. Barron Co.* 44 Wis. 686; *Crandon v. Forest Co.* 91 Wis. 239, 64 N. W. 847; *Wallace v. Menasha,* 48 Wis. 79, 4 N. W. 101; *Hayes v. Oshkosh,* 33 Wis. 314; *Vigo Tp. v. Knox Co.* 111 Ind. 170, 12 N. E. 305; *Gray v. Tompkins Co.* 93 N. Y. 603. We think it clear under the constitution and statutes governing this subject that there can be no liability against the defendants or either of them except upon a showing that they received the money and actually used it for legitimate municipal purposes. *Thompson v. Elton,* 109 Wis. 589, 85 N. W. 425; *Rice v. Ashland Co.* 114 Wis. 130, 89 N. W. 908.

We are of opinion that the complaint fails to state a cause of action, therefore the demurrers of the plaintiff to the respective answers of the defendants should have been sustained as demurrers to the complaint, and the demurrers to that part of the answers setting up the statutes of limitation should

have been overruled, for the reason that the complaint fails to state a cause of action in not stating or showing by appropriate allegations that the defendants actually received and used for legitimate municipal purposes the money sued for.

By the Court.—The orders appealed from are reversed on both appeals, and the cause remanded for further proceedings according to law.

TIMLIN, J., took no part.

STATE EX REL. SULLIVAN VS. DISTRICT COURT OF MILWAUKEE COUNTY and another.

January 10—February 21, 1911.

Constitutional law: Right of trial by jury: Taxing jurors' fees as costs against accused: Writ of prohibition, when lies.

1. Ch. 218, Laws of 1899,—creating the district court of Milwaukee county with limited criminal jurisdiction, and providing that the accused therein may demand a jury of not more than twelve nor less than six men; that the clerk shall proceed to draw in the presence of the jury commissioners (unless their presence is waived) from the box containing the names of persons furnished by said commissioners to serve as petit jurors in the municipal court, twice the number of jurors demanded by the accused; that from the list so prepared the parties shall alternately strike out so many names as shall leave the number demanded; that either party may challenge any juror for cause; and that deficiencies caused by challenges or otherwise shall be supplied by talesmen,—accords to the accused the privilege of a trial by a lawful jury and does not deny to him any constitutional right in respect thereto.
2. The fact that said act provides that the fees of jurors shall be taxed as costs in the action, and in case of conviction taxed against the accused, does not invalidate it, the subject of costs and the items thereof being largely a matter of legislative discretion.

3. Even if a defendant accused of criminal libel is entitled to a preliminary examination before he can lawfully be tried (a point not decided), error of the court in refusing such preliminary examination cannot be considered upon a motion for a writ of prohibition. That writ cannot be used to perform the ordinary functions of an appeal or writ of error.

PROHIBITION to the District Court of Milwaukee County: NEELE B. NEELEN, Judge. *Alternative writ quashed.*

On the 8th day of September, 1910, upon a complaint sworn to by one August J. Peterie, charging the relator with the offense of criminal libel committed within Milwaukee county, Wisconsin, in violation of sec. 4569, Stats. (1898), a warrant was issued out of the district court of Milwaukee county directing the arrest of the relator upon said charge. On the 12th of September the relator was arrested and brought into said court and, upon his application, the case was continued for cause to October 5, 1910, at 9 o'clock in the forenoon. On October 5th counsel for relator requested a preliminary examination, which request the court refused. The attorney for the relator then objected to the jurisdiction of the court, but the objection was overruled, whereupon the relator's attorney filed a plea in abatement, to which plea the district attorney demurred and the demurrer was sustained by the court. Upon the refusal of the relator to enter a plea of guilty or not guilty to the complaint, the court ordered that a plea of not guilty be entered, and the district attorney offered the relator a trial by a jury of six or twelve men, whichever the said relator might elect, without cost to said relator. By consent of all parties the case was continued for cause to November 2, 1910, at 9 o'clock in the forenoon. In the meantime, and on the 25th day of October, 1910, counsel for relator obtained an alternative writ of prohibition from this court staying proceedings in the action until the further order of this court and requiring the respondent to show cause on the 15th day of November, 1910, why it should not

be absolutely restrained from any further proceedings in said action. The respondent made due return and moved to quash the alternative writ of prohibition.

E. T. Fairchild, for the relator. [No brief on file.]

Ernst A. Kehr, for the respondent. [No brief on file.]

VINJE, J. It is urged by counsel for relator that the district court had no jurisdiction to hear, try, and determine the case. Sec. 4569, Stats. (1898), provides that "any person guilty of libel shall be punished by imprisonment in the county jail not more than one year or by fine not exceeding $250." Ch. 218 of the Laws of 1899 established the district court of Milwaukee county, and sec. 5 of said act defined its jurisdiction as follows:

"Said district court shall have exclusive jurisdiction to try and sentence all offenders against the ordinances of said city of Milwaukee, and it shall also have exclusive jurisdiction to hear, try and determine all charges for offenses arising within said county of Milwaukee, the punishment whereof does not exceed one year's imprisonment in the state prison or county jail or a fine of $500, or both such fine and imprisonment."

Sec. 10 of said act provides:

"After issue joined and before trial in all cases cognizable before said district court the accused may demand a trial by a jury of not more than twelve nor less than six men, and shall designate the number at the time of the demand. The court shall then direct the clerk to proceed to draw in the presence of the jury commissioners of Milwaukee county, unless such accused shall waive the presence of said commissioners, from the box containing the names of persons furnished by said jury commissioners to serve as petit jurors in the municipal court of the city and county of Milwaukee, twice the number of jurors demanded, and from the list so prepared by the clerk, the parties shall then alternately strike, the accused commencing, so many names as shall leave remaining the number demanded."

The act then further provides how the jury shall be summoned, and that either party may challenge any juror for cause, and that the deficiencies occasioned thereby, or by any other cause, shall be supplied by talesmen to be selected and summoned by an officer of the court. It further provides that the fees of such jurors shall be taxed as costs in the action.

The offense with which relator was charged was committed within the county of Milwaukee, and the punishment thereof did not exceed one year's imprisonment in the state prison or county jail nor a fine of $500. The district court, therefore, not only had jurisdiction to hear, try, and determine the charge, but, by virtue of the act referred to, it had exclusive jurisdiction thereof. The court was also provided with a jury selected by the same officers who select jurors for the municipal court of Milwaukee county, which court has exclusive jurisdiction of all criminal matters not triable in the district court. If relator demanded a jury of only six he would have the right to peremptorily challenge three, or one half of the jury instead of one third thereof, as under the general statute, and if he demanded a jury of twelve he would have six, or two more peremptory challenges than under the general statute. He could call for a jury of twelve and so secure the two extra peremptory challenges. His right to examine the jurors and challenge them for cause or for favor remained unimpaired, and the method of supplying deficiencies was the usual, time-honored one of calling talesmen. It must therefore be held that the relator was accorded the privilege of a trial by a lawful jury, and that he cannot properly complain of the denial of any constitutional right in that respect. *State ex rel. Gubbins v. Anson,* 132 Wis. 461, 112 N. W. 475.

Assuming, but not deciding, that the district attorney had no right to waive the provisions of the law relative to the

fees of the jury, the fact that the law provides they shall be taxed as costs in the action, and hence in a case of conviction are to be taxed against the relator, does not invalidate it. Sec. 4633, Stats. (1898), provides:

"When a fine is imposed as the whole or any part of the punishment for any offense by any law the court shall also sentence the defendant to pay the costs of the prosecution and the costs incurred by the county at request of the defendant, and to be committed to the county jail until the fine and costs are paid or discharged."

The subject of costs and the items thereof are largely matters of legislative discretion, and the legislature can add or take away such items as it deems proper, provided the exercise of its discretion in that regard is reasonable. It is certainly competent for it to say that, in addition to other costs, the defendant if convicted shall pay the fees of the jury. *Faust v. State,* 45 Wis. 273.

It is further urged by the relator that his demand for a preliminary examination should have been granted; that he had never waived the same and that he could not be lawfully tried until he had such preliminary examination. Even if such contention be correct, the error of the court in refusing a preliminary examination can be reviewed only upon appeal or writ of error. It cannot be considered upon a motion for a writ of prohibition. *Petition of Pierce-Arrow M. C. Co.* 143 Wis. 282, 127 N. W. 998. It was there held that a writ of prohibition cannot be used to perform the ordinary functions of an appeal or writ of error.

It follows from what has been said that the relator was denied no right or privilege granted to him by the laws or constitution of this state, and hence the motion to quash the alternative writ of prohibition must be granted.

By the Court.—It is so ordered.

MORGAN, Appellant, vs. HODGE and another, Respondents.

January 31—February 21, 1911.

Sales: Fraud: Opinions as to value: Conspiracy: Damages: Remoteness.

1. Mere expressions of opinion as to the value of property offered for sale, even though the estimate be substantially greater than the real value, will not of themselves alone amount to a fraud upon the buyer; but the law requires good faith and that no artifice or trick be resorted to by the seller to throw the buyer off his guard or prevent inquiry.
2. Although, by a fraudulent conspiracy between the defendants, vendors of a livery stock and business, and plaintiff's partner in the purchase of the same, plaintiff was led to believe that such partner was paying the same price as himself for a half interest therein, when in fact he was paying $1,500 less, plaintiff could not for that reason recover as damages the amount of his loss on a resale of the property, on the claim that if he had known the facts he would not have made the purchase or embarked in the business, such damages not being proximately caused by the act of concealment complained of.
3. But, plaintiff having given his own note to his partner for $750 under the belief that such partner had contributed $1,500 more than himself toward the purchase, which belief was induced by false representations and the use of a dummy check, he was entitled to be indemnified to that amount for the fraud practiced upon him.
4. Although plaintiff, after giving the vendors an opportunity to repurchase the property, sold out at a loss to his partner, releasing the latter from liability for the fraud and receiving indemnity against his note to the partner, which had been lost, yet, if in making such sale he was obliged, in the exercise of reasonable diligence, to pay a substantial sum to secure his release from said note, he is entitled to recover that sum from the defendants.

APPEAL from a judgment of the circuit court for La Crosse county: JAMES O'NEILL, Judge. *Reversed.*

Action to recover damages resulting from a fraudulent conspiracy. A nonsuit was granted at the close of plaintiff's

testimony, and the plaintiff appeals. The following facts appeared on the trial:

For some time prior to May 1, 1909, the defendants operated a large livery stable upon rented real estate at La Crosse. One Isaac Hollenbeck, Jr., had some negotiations with them looking towards a purchase of the business by trading a farm therefor in the spring of 1908, but no agreement had been reached. About April 18, 1908, Hollenbeck came to New Lisbon, where plaintiff lived, bringing with him one Bovee, a real-estate man, who was employed by the defendants to make the sale, and interested the plaintiff in the project, proposing a partnership in the business. As a result all of the parties, plaintiff, Bovee, and Hollenbeck, went to La Crosse by train on the same day, and on the following day plaintiff examined the stock of carriages, horses, and other personal property, and also the books showing the business done. On the following day *Hodge,* Hollenbeck, and plaintiff went to Alma Center, where Hollenbeck lived, and looked over the farm which Hollenbeck proposed to trade, but no terms could be agreed on and that idea was abandoned. The parties returned to La Crosse and began to talk about a cash trade. Plaintiff had $3,000 in cash, Hollenbeck had a house and lot at Alma Center which defendants were willing to receive at $2,500. Hollenbeck proposed to give his note for $500 so that his individual contribution should also be $3,000. The plaintiff claims that the defendants and Hollenbeck conspired to defraud the plaintiff and induce him to make the purchase, and that the fraud consisted (1) of false representations as to the value of the property, in that they represented it to be worth $16,800, when as matter of fact it was not worth to exceed $11,000, and (2) of inducing the plaintiff to believe that Hollenbeck and he were each paying one half of $16,800 as the purchase price, when as matter of fact Hollenbeck was paying only half of $15,300 for his half interest.

The deal was finally concluded by written agreement

April 22d. By this agreement the livery stock and business was contracted to be sold and possession given to Hollenbeck and *Morgan* May 1st following, in consideration of the sum of $16,800 to be paid as follows: $800 by assuming a debt of $800 owing by defendants, $100 cash down and $2,900 on May 1st by the plaintiff, *Morgan,* a house and lot at $2,500 and a note of $500 by Hollenbeck, $1,500 in cash by Hollenbeck, and the remainder of the purchase price, viz., $8,500, in monthly payments evidenced by notes and secured by chattel mortgage on the stock. This arrangement was apparently carried out on May 1st following, when the parties met and the bill of sale was made out and passed. At this time plaintiff paid over the $2,900; Hollenbeck delivered the deed of the house and lot and his note of $500; Hollenbeck and plaintiff signed notes aggregating $8,500, payable in monthly instalments and secured by a chattel mortgage as provided by the contract; and Hollenbeck drew and delivered to the defendants a check for $1,500 which plaintiff supposed was a *bona fide* payment of cash. In order to make the amounts contributed by the partners even, plaintiff executed and delivered to Hollenbeck his note for $750, which at Hollenbeck's request was made payable to one Wheaton and delivered by Hollenbeck to Wheaton as collateral security to indemnify Wheaton as indorser on a note he had signed at the bank as surety for Hollenbeck. The $1,500 check was a mere dummy check and was returned to Hollenbeck shortly afterwards and destroyed.

The evidence tends to show that the apparent purchase price of $16,800 was arranged between Hollenbeck and the defendants shortly before the contract was signed, and that it was understood between them that *Morgan* should be led to believe that it was the real price and should pay for his half on that basis, while Hollenbeck was to pay only half of $15,300, and that the dummy check was to be given to carry out the deception. It is undisputed that *Morgan* supposed

that Hollenbeck was paying the same for his half as he (*Morgan*) was paying. The new firm conducted the business for a number of months and paid some of the chattel mortgage notes, but the business did not prove as prosperous as expected and plaintiff soon became convinced that the firm could not pay for it, and, further, that the price paid was too great. He began to make efforts to sell, without success, and in February, 1909, he was informed by *Bradbury* of the fact that the check for $1,500 was a dummy check and never in fact paid. Thereupon and on February 20, 1909, the plaintiff served written notice on *Hodge, Bradbury,* and Hollenbeck rescinding the purchase, demanding back the money he had paid and the surrender of his notes, and offering to return the property. This demand not being acceded to, he immediately commenced an action against the three last named parties, the nature of which does not clearly appear in the evidence, but it is referred to in the briefs as an action for rescission on the ground of fraud. In this action it was stipulated that the property be placed in the hands of one Atkinson, and thereafter the defendants took possession of the property under the chattel mortgage and advertised it for sale. Before sale plaintiff received an offer from Hollenbeck for the purchase of his half interest in the property, and he thereupon notified the defendants of the offer and its terms and gave them an opportunity again to rescind. Nothing resulting from this, he closed with Hollenbeck's offer and received from him $1,425 and a contract releasing him from liability on the $750 note (which had been lost). In order to make this settlement he was obliged to release Hollenbeck from all liability for the alleged fraud, but the release expressly reserved all rights of action against *Hodge* and *Bradbury.*

Upon this showing the circuit court was of the opinion that the only legal damage suffered by the plaintiff in any event was the damage resulting from the giving of the $750

note, and inasmuch as the plaintiff had been given a contract protecting him from any liability on that account he had no cause of action.

For the appellant there was a brief by *Bunge & Bosshard,* and oral argument by *George W. Bunge.*

Jesse E. Higbee, for the respondents.

WINSLOW, C. J. Although the facts seem somewhat complicated the case is really simple. The action is to recover damages suffered by reason of a fraudulent conspiracy. Plaintiff's claim is that the defendants conspired with Hollenbeck to induce him to make the purchase of the stable by fraudulent representations as to the value of the property and by concealing from him the fact that Hollenbeck was obtaining his half of the property for a lower price; that he relied on the representations and made the purchase and has suffered legal damage as the proximate result of such purchase. Whether there was ever a right of rescission, or whether if there was once a right of rescission it has been lost, are matters of no moment. The present action is not an action for rescission but for damages, and there can be no recovery unless it be shown that a legal fraud was committed on the plaintiff from which damages have proximately resulted to him.

We agree entirely with the conclusion of the circuit court as to the first element of fraud relied upon. Men are allowed when selling property to express their opinion as to its value and the law takes account of the natural, if not unavoidable, tendency of the owner to place an exaggerated value upon his own property when he is about to sell it. If every vendor were to be held to be guilty of fraud whenever he places the value of property about to be sold at a considerably higher figure than witnesses would place it on the witness stand, ordinary commercial transactions would become highly dangerous. Purchasers are presumed to know that

the vendor will, if asked as to the value, place it as high as he thinks the property will bear, and, on the other hand, the vendor knows that the purchaser will endeavor to convince him that the property is worth considerably less. "'It is naught, it is naught,' saith the buyer, but when he is gone his way, then he boasteth." Chaffering as to value has gone on ever since the race emerged from barbarism and is likely to go on so long as the race retains its commercial propensities.

On these universal and very human traits is based the rule that expressions of opinion as to value, even though substantially greater than the real value, will not of themselves alone amount to fraud. The law requires good faith, however. While it will not place the badge of fraud upon a mere extravagant estimate of value, it sternly requires that no artifice or trick be resorted to by the seller to throw the purchaser off from his guard or prevent inquiry, and it requires a vendor who has superior knowledge of values in dealing with one whom he knows or has reason to believe is ignorant on the subject to place the property honestly before the purchaser and give him every opportunity to ascertain for himself the truth. *Maltby v. Austin,* 65 Wis. 527, 27 N. W. 162; *Mosher v. Post,* 89 Wis. 602, 62 N. W. 516; *Farr v. Peterson,* 91 Wis. 182, 64 N. W. 863; *J. H. Clark Co. v. Rice,* 127 Wis. 451, 106 N. W. 231.

In the present case the property consisted of a large stock of horses, carriages, and conveyances, with the usual paraphernalia of a livery stable, which were being sold in connection with an established business. The room for differences of opinion as to the value of such a quantity of property was manifestly very great. It appears affirmatively that the plaintiff was allowed and even encouraged to make examination of every article of property. No difficulties were thrown in his way. He was shown the books of account and apparently every effort was made to put him in possession of

every material fact. He was a man of mature years who had once been sheriff of his county. He had been in the hotel business at New Lisbon for twelve years and had previously been in the livery business at Necedah. No advantage was taken of him. He had every opportunity to ascertain the value of the property which he was proposing to purchase, and we find no ground for the claim that the statements as to its value can be considered as amounting to fraud.

As to the fraudulent concealment of the amount which Hollenbeck was paying for his half interest in the business the considerations are different. The plaintiff's claim as to this alleged element of fraud is substantially this: that had the plaintiff known of this inequality in the price he would not have made the purchase or gone into the business with Hollenbeck, and that having thus been induced to embark in the business and having been obliged to sell out at a loss he should be allowed to recover as damages the difference between what he paid and what he received on the sale to Hollenbeck. The circuit court held that the only element of damage legally chargeable to the concealment was the giving of the note to Wheaton to even up the pretended difference in the contributions of the partners, and hence when this note was canceled or the plaintiff had received indemnity against it no cause of action remained.

The plaintiff's claim, if approved, would certainly open up a large and rather vague field of liability. It would mean substantially that if one partner by concealment obtained some advantage over his copartner in the matter of his contribution to the capital of the firm, the partner so deceived might on discovery of the concealed fact dissolve the partnership, close out the business, and recover his original investment from his copartner. We are not prepared to sanction so broad and sweeping a rule as this. In the present case it seems to us impossible to say with that degree of certainty which should characterize legal conclusions that the loss suf-

fered by the plaintiff was proximately caused by the act of concealment complained of. The fact that plaintiff unwittingly paid a larger price for his half than his partner did not make the property any less desirable: there was just as good a prospect of the business being profitable in one case as in the other. So far as the evidence throws light on the situation, it does not with any certainty indicate that the act of concealment in question was the proximate cause of the plaintiff's money loss. It certainly was not the cause of the unsatisfactory business done by the new firm, and it did not render them incapable of meeting their obligations. They apparently had no property except what they put into the business, and they loaded themselves with what seems to have been an impossible debt. The result was bankruptcy and a forced sale of the firm property. But to say that the plaintiff's loss resulting from this is chargeable to the act of concealment complained of is to indulge in mere conjecture. The conclusion is too remote from the premise; there are too many substantial and sufficient causes between.

As to the $750 note, however, the plaintiff was certainly entitled to relief. This was based solely on a false representation of fact. He was entitled to recover his money if he had paid it, or he was entitled to have it canceled or to be indemnified against the possibility of being held for it in case it could not be canceled. The latter seems to have been the case here, and it is admitted that he has received a "contract" indemnifying him. On this ground the plaintiff was nonsuited because the trial court concluded he had thus obtained the entire relief to which he was entitled. But it seems to us that here was plain error. The plaintiff was entitled to this indemnification without expense. If, acting with reasonable prudence, he was obliged to pay for his release from this fraudulent obligation, he is entitled to recover what he was obliged to pay. He must, of course, exercise that degree of diligence in extricating himself from his difficulties which a reasonably prudent man would exercise under like circum-

stances, and if, after having done so, he was obliged to purchase his indemnity from this fraudulently secured note, he is entitled to recover the sum which he was obliged to expend for that purpose. There certainly was ample evidence in this case to sustain the conclusion that, in settling with Hollenbeck and obtaining his release from the note, he was in effect compelled to pay for his release. He surrendered his half ownership of property which had cost him $3,000 a few months before, and to which he had afterwards contributed $450, for the sum of $1,425 in cash and a release from the note. *Prima facie* it would seem from these facts alone that the plaintiff paid full value for the release. Other facts may perhaps appear which would show that the parties did not consider that the plaintiff was paying the face of the note for his release, but certainly there was ample evidence to support the conclusion that the plaintiff paid a substantial sum to secure his release; and if it be further found that he paid that sum in the exercise of reasonable diligence and that the note was induced by a fraudulent conspiracy in which the defendants joined, there should be a recovery for the sum so paid.

By the Court.—Judgment reversed, and action remanded for a new trial.

HOLWAY, Executrix, Respondent, vs. SANBORN and another, Appellants.

January 31—February 21, 1911.

Payment: Presumption from lapse of time: Rebuttal: Evidence: Instructions to jury: Appeal: Review: Verdict: Witnesses: Competency: Transactions with persons since deceased.

1. The unexplained circumstance of a demand being twenty years past due creates a presumption of payment thereof.
2. The aforesaid rule is according to the common law and subsists notwithstanding the written law.

3. Unlike the statute of limitations the common-law rule is not a bar nor a legal presumption conclusively extinguishing the debt.
4. The presumption of payment is one of fact, rebuttable by evidence, direct or indirect, or both, showing to the contrary, the burden of proof being on the creditor.
5. While the common-law presumption of payment is one of fact it should prevail unless quite satisfactorily overcome by competent evidence.
6. The evidentiary character of the common-law presumption of payment may be overcome by circumstances alone, in the reasonable judgment of the court, not too remote, sufficient to satisfy a jury, to a reasonable certainty.
7. For rebuttal of the common-law presumption of payment evidence of absence of the debtor from the state during the whole or a large part of the twenty years, facts preventing the creditor from bringing suit, relationship of the parties, possession of the evidence of indebtedness by the payee, or his personal representative, or in case of death of the former, finding such evidence among the papers left by him apparently unpaid, and many other circumstances according to diverse situations,—are competent.
8. The court may properly mention to the jury the evidence bearing on any controversy, speaking of it correctly, and, in case of conflict, without suggesting the effect thereof.
9. If, in any reasonable view of the evidence in any case, the jury could honestly have come to the conclusion complained of, the judgment cannot properly be disturbed on appeal, even though from the record alone the major probabilities may appear otherwise to the reviewing court.
10. Under sec. 4069, Stats. (1898), excluding testimony of a party as to any conversation or transaction had by him with a deceased person under whom he claims, the testimony of a third person, present and constructively participating in the conversation or transaction by in any way exerting an influence in respect thereto, is also excluded.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for La Crosse county: GEORGE GRIMM, Judge. *Affirmed.*

Action to recover on a promissory note.

Complaint in the usual form, plaintiff suing as personal representative of the deceased payee.

The note was made December 31, 1882, for $250, payable

with interest at the rate of six per cent. per annum in one year after date. The payee resided when the note was given and thereafter till his decease in the state of Wisconsin. During all that time and till the action was commenced, as alleged, defendants resided on the Pacific coast. They omitted to pay any part of principal of the note or interest thereon. Plaintiff asked for judgment for such principal and interest, amounting to $639.

Defendants pleaded payment, and, further, that more than six years elapsed before the commencement of the action after appointment of plaintiff as personal representative of the deceased; and that about three years after such appointment she, by resignation, ceased to be such representative, and by reason of such facts she ceased to have legal capacity to prosecute any action upon the note.

The making and delivery of the note was admitted. These facts were established: Plaintiff had legal capacity to sue as she did. The note came duly to her possession in her capacity as personal representative of the payee and as part of the assets of his estate. The debt became due more than twenty years before the action was commenced and more than eight years before the holder thereof died. It was not inventoried as part of his estate and no demand for payment was made till the action was commenced, during all of which time defendants were financially able to pay. The payee had possession of the paper from the time it was made till he died, and soon thereafter it came into the possession of plaintiff. She found it among the valuable papers left by deceased. He was a resident of Wisconsin during all the time till he died and likewise was plaintiff till suit was commenced. During all such time defendants resided on the Pacific coast. Defendant *Lillie Sanborn* is the daughter of the deceased by his first wife and her codefendant is her husband. Plaintiff is the widow of deceased. She was duly appointed with another as a personal representative of deceased pursuant to his

will. The co-executor resigned in 1896. Defendants visited this state, at least once, after maturity of the note during the lifetime of the payee and several times thereafter. There was evidence tending to show that plaintiff made efforts to collect the note soon after it came to her possession; that she employed attorneys therefor who made efforts to obtain service of a summons on defendants in an action to enforce payment and finally succeeded.

The court submitted to the jury the issue of payment, instructing them that from the stale nature of the note there was a presumption of fact of payment thereof. The finding was in favor of plaintiff and judgment was entered accordingly.

George H. Gordon, for the appellants.

Jesse E. Higbee, for the respondent.

MARSHALL, J. The first question presented for consideration is this: Is the presumption of payment which by the rules of the common law arises from the circumstance of a debt being twenty years past due, one of fact merely, rebuttable by evidence of nonpayment, or is it one of law, in legal effect extinguishing the debt? That is ruled in favor of the first of the alternatives by *Delaney v. Brunette,* 62 Wis. 615, 23 N. W. 22. The presumption is there spoken of as a mere evidentiary inference of payment subject to be overcome like any other debatable matter, except the fixed period requisite to create the presumption gives an artificial dignity, so to speak, to the circumstance of such weight as to require pretty satisfactory evidence to overcome it. That is but a declaration of a familiar elementary principle. It will be found stated and applied in numerous adjudications elsewhere and also stated in all text-book authorities.

A good type of the adjudications outside of our own state is *Hale v. Pack's Ex'rs,* 10 W. Va. 145, to the effect that the statute is supplementary to the common-law limitation, but

the latter is not a legal bar, it is only a presumption of fact rebuttable by evidence satisfactorily showing the truth to be otherwise.

A good type of the text-book authorities is Jones on Evidence at secs. 63 to 66 inclusive (2d ed. §§ 66–69). That is particularly valuable because of the numerous citations mentioning circumstances judicially regarded as competent to be considered by a jury in respect to whether the presumption should prevail or not. The text referred to is in these words:

"The presumption of payment arising from the lapse of time may of course be rebutted by satisfactory and convincing proof; but in such case the burden of proof rests upon the creditor."

The following circumstances bearing on the question, particularly applicable to this case, are mentioned: the absence of the debtor from the state during the greater part of the time relied on to create the presumption (*Daggett v. Tallman,* 8 Conn. 168; *McLellan v. Crofton,* 6 Me. 307, 334); facts preventing the creditor from bringing suit (*Hale v. Pack's Ex'rs,* 10 W. Va. 145; *Crooker v. Crooker,* 49 Me. 416); relationship of the parties and that the collection of the money might have occasioned distress or great inconvenience (*Wanmaker v. Van Buskirk,* 1 Saxt. Ch. (N. J.) 685. Many other circumstances might be mentioned, among them some characterizing this case, as the jury might reasonably have concluded from the evidence; such as, possession of the note by the payee down to the time of his demise; finding it among his papers notwithstanding pretense that at a personal interview, the details of which were excluded under the statute, it was claimed to have been paid; finding it among his valuable papers apparently as an existing obligation; efforts to avoid service of papers within the state and efforts to obtain such service within the twenty years.

Since the presumption of payment in such a case rests on

circumstantial evidence, necessarily, rebuttal thereof is particularly within a field rendering such evidence competent and, generally, the main reliance, especially in case of death of the payee, as in this case. "Any facts and circumstances," as it is said, "which render it more probable than otherwise that payment has not in fact been made, may be received." If they, in the whole, are, in reason, sufficient to overcome the presumption of payment arising from the lapse of time, and evidence corroborative of it, satisfying the jury that the truth is otherwise, a verdict for a recovery is proper.

The next proposition for discussion is this: Did the court err in rejecting the evidence of defendants, or either of them, respecting a conversation claimed to have been had by them with the payee in respect to the note? Such evidence was rejected, primarily, under sec. 4069, Stats. (1898). That it was properly rejected as to the one confessed to have had the conversation is too clear for discussion. As to the other, the correctness of the ruling turns on whether the person, not actually taking part in the conversation or transaction, was by his presence and influence a participant therein. *Schultz v. Culbertson,* 125 Wis. 169, 103 N. W. 234. So at the outset the court had to pass upon a question of competency, involving determination of a matter of fact. In that situation it is elementary that the result is not disturbable on appeal unless manifestly wrong. That rule, as we view the record, controls the proposition in favor of respondent.

Respondent was permitted to testify as regards directions she gave her attorney in respect to collecting the note. That was fairly within the field of competency as a circumstance bearing on the evidentiary effect of the presumption of payment from lapse of time, and it seems to have been offered and received on that account alone.

The next proposition suggested for decision is: Did the circuit judge err in saying to the jury that the note was found among the valuable papers of the deceased apparently un-

paid? The idea intended to be thereby conveyed and the only one which probably reached the jury is that the paper was found, as stated, and that there was nothing about it indicating payment, which is strictly correct. It is not error in giving instructions to speak of evidence to be considered, mentioning the same correctly, and without suggesting its effect where there is room for conflicting inferences. There was no suggestion as to the weight of the circumstance here. That was left entirely to the jury to consider in connection with all other evidence.

The last proposition is, whether the evidence warranted the verdict. The case was peculiarly one for jury determination. If in any reasonable view of the evidence they could honestly have reached the conclusion which they did, it cannot be disturbed on appeal even though it may appear here that the major probabilities are the other way. That elementary doctrine, as we view the record, rules the last proposition in favor of respondent.

By the Court.—The judgment is affirmed.

GUILE, Executrix, Respondent, vs. LA CROSSE GAS & ELECTRIC COMPANY, Appellant.

January 31—February 21, 1911.

Master and servant: Personal injury: Explosion of gas: Unsafe appliance: Evidence: Questions for jury: Notice of injury: Failure to serve, induced by master's conduct: Estoppel: Statutes of limitation.

1. In an action against a gas company for personal injuries to an employee caused by an explosion of air mixed with gas which had escaped in the purifying house, a finding by the jury that the gas was ignited and exploded by a spark from the electric lamp inside said house is *held* to be sustained by the evidence, although officers of the defendant testified that the electric cur-

rent had been turned off from said house previous to the accident, and there was other testimony tending to show that plaintiff entered the house with a lighted torch.

2. It appearing by the evidence that "blowouts" frequently occurred in the purifying room resulting in an escape of gas which, being mixed with the air, created a highly explosive mixture readily ignited by a spark, and that the electric lamp in use was likely to emit a spark when the current was broken, it was a question for the jury whether such electric lamp was, under the circumstances, a reasonably safe appliance for that place.

3. Findings by the jury upon sufficient evidence that within a year after personal injury to a servant the master represented to him, in substance, that he need not serve any notice of injury in order to preserve his rights against the master, that an insurance company was bound to pay him his damages resulting from such injury, and that the master would enforce such claim for him; that the servant had reasonable cause to believe from such representations that he was excused from serving a notice of injury within the year; and that he failed to serve such notice because he relied upon such representations, constitute a sufficient basis for holding the master estopped from insisting that such failure to give notice barred the action under subd. 5, sec. 4222, Stats. (1898), if an estoppel *in pais* can have such effect.

4. The provision of subd. 5, sec. 4222, Stats. (1898), that no action to recover damages for an injury to the person shall be maintained unless the notice therein prescribed shall be served within a year, although a statute of limitation, differs in its nature and purpose from ordinary limitation statutes and demands the application of different rules of law. All of its requirements being such that the person subject to be charged may willingly forego them, and may therefore readily induce the injured person to believe that he will forego them, if a failure to give the notice has been reasonably induced by the defendant he may be held to be estopped from insisting upon such default as a bar to the action.

MARSHALL, J., dissents.

APPEAL from a judgment of the circuit court for La Crosse county: A. H. REID, Judge. *Affirmed.*

This is an action to recover damages for personal injuries suffered by the plaintiff, Henry Marquardt, through an explosion of a mixture of gas and air in the purifying house of

the defendant's gas plant. It is claimed that the explosion was caused by the negligence of the defendant.

The defendant made its gas from coal. The gas is extracted from the coal by applying heat to the retort in which the coal is placed. When the gas has been extracted from a charge of coal in a retort and it is desired to recharge the retort with a fresh supply of coal, a torch is used to light the gas remaining in the retort and coke. From the retorts the gas is conducted to the four purifying boxes in the purifying house after undergoing processes which are not material to this case. These boxes are between eleven and twelve feet in width and between fourteen and fifteen in length. Along the upper edge of the purifying boxes was a trough twelve or fourteen inches deep around the whole edge of the box. A flange along the edge of the covers of the boxes fitted into the troughs. Water poured into the troughs sealed the boxes and prevented the escape of the gas from the boxes. The boxes extended below the floor and projected about a foot above the floor of the purifying house. They were placed in a row lengthwise of the boxes and of the purifying house, and were filled with oxide of iron mixed with shavings to remove sulphur hydrogen from the gas passing through.

The door into the purifying house was in the east wall of the building opposite the space between the two center boxes. Tar and other foreign substances were removed from the gas while it passed from the retorts to the gas reservoirs. The purifying house was lighted by electricity. A switch outside of the building near the door controlled the three lights on the one circuit in the building. One of the lights, near the door and also near a gauge, had a key switch in the socket which could be reached from the floor and which could control this light if the current was turned on through the outside switch. The other two lights were without such socket key switches and were out of reach.

Whenever the retorts are overcharged so that gas is pro-

duced more rapidly than it can be handled in the purifying boxes, when the gas holder sticks and cannot receive the gas from the purifying boxes, or when friction in the pipes or stoppages therein produce an overpressure in the purifying boxes, this overpressure forces the water from the troughs of the boxes and allows the gas to escape into the room of the purifying house. This is known as a "blowout." The overpressure of gas in the purifying boxes may be temporary or permanent. If temporary, the troughs are refilled with water and the box thus sealed again. If permanent, other measures must be taken to relieve the pressure to enable the production of gas to go on.

There was evidence in the case that a mixture of gas and air in the proportions of one to seven or eight would be very explosive and might be exploded by the spark produced by breaking an electric current with a key switch such as was in use on the light near the gauge in the purifying house.

The accident happened between 11:30 p. m. and midnight on May 19, 1906. Plaintiff had worked for the defendant for about fifteen months as laborer and fireman, and three or four days before the accident he had been made head fireman. As head fireman he had charge of the works and had two other firemen under him, and had direct control of the charging of the retorts. The retorts had been charged and the firemen were about to eat lunch. The plaintiff went out of the retort house to the meter room and noticed that the meter indicated that gas was not going into the holder but was coming from it. On looking into the engine room he found everything all right there, but on going out of doors he heard a noise in the purifying house which meant that gas was escaping because of a blowout.

The plaintiff testified that when he became assured that there was a blowout he went into the retort house and told the firemen of it and directed them to bring some water. They ran out and he took a pail, filled it with water from a barrel

in the retort house, ran with it to the purifying house, and poured the water into the seal of the box which had the blowout. When the men came in with the pails of water he showed them where to pour it and told them to get more. They went out, and he needing light felt for the switch near the door, turned the key, and immediately an explosive flash followed.

The evidence showed that the side walls of the purifying house were blown out and down, the roof fell upon the boxes and caught fire from the burning gas which was escaping from the box which blew out, and the plaintiff was caught under the roof and severely injured and burned.

The two assistant firemen, Wagner and Dumke, testified that the plaintiff came into the retort house as they were preparing to eat lunch, told them there was a blowout, and directed them to get some water. They ran for water, and each carried a pail of water into the purifying house and emptied it into the seal of the box which had blown out. They immediately turned about to go out of the house for more water and met the plaintiff coming toward the house with a pail of water in one hand and a lighted torch in the other. One of the assistant firemen testified that he told the plaintiff to "Look out for the torch." The other testified that he heard the other fireman call out something about a torch. They had gone but a short distance from the building when the explosion occurred. One of these firemen telephoned for the fire department, notified the officers of the defendant of the accident, and then removed some of the *debris* and from the ruins pulled the plaintiff, who was lying under the roof near the burning gas and was being burned by it. The fire department responded, extinguished the fire, and in doing so sealed the purifying box and extinguished the gas.

The theory of the defendant is that the explosion was caused by the lighted torch which it is claimed the plaintiff carried into the purifying room filled with escaping gas. As

tending to support this theory there was evidence by the officers of the company that the plaintiff admitted while at the hospital that he had carried the lighted torch into the building; one of the officers testified that he had tested the lights that day and found them all right; an officer of the company testified that the next day he found the torch, the plaintiff's hat, and the pail in which he carried water near the door; one of the officers testified that he had turned off the current from the purifying house by the outside switch, leaving no current in the wires, about an hour before the explosion; the firemen testified, as stated above, that the plaintiff carried a lighted torch toward the building shortly before the explosion; one of them testified that he was present when the torch was picked up the next day, and that when work was resumed that night and it was desired to light the gas in the retorts preparatory to recharging them it was necessary to make a new torch because the one which had been used for this purpose was missing.

There was evidence tending to show that the plaintiff was not fully conscious when he was interviewed at the hospital, and the plaintiff's daughter testified to admissions of the two firemen that the plaintiff did not have a torch at the time of the explosion. There was evidence tending to show that there was no light in the purifying house when the firemen went into it. The plaintiff testified that he did not turn on the current by the outside switch, and he admitted that he did not know whether or not there was a light in the house when he went in, and claimed that if there was such a light it was obscured by the steam and vapors arising from the "blowout."

The plaintiff admits that no notice of the accident and of a claim for compensation was served upon the defendant within a year. There was evidence that the officers of the defendant told the daughter of the plaintiff that it was not necessary to serve any papers upon them, that any damages

would have to be paid by the insurance company in which the defendant was insured against damages because of injuries to employees; that the officers of the defendant stated to the daughter of the plaintiff that they would do all they could to obtain damages for the plaintiff from the insurance company; and there was evidence of an offer of $100 from the insurance company to the plaintiff on condition that he would give an absolute release of his claim. It was admitted that the offer was made and the promise given that defendant's officers would do what they could to obtain something from the insurance company for the plaintiff.

The jury found by special verdict that the escaping gas in the purifying house was ignited and exploded by an electric spark emitted from the electric light inside the house when the plaintiff operated the key at the socket to turn on the light; that the electric lighting equipment was not reasonably safe for the use of the plaintiff in performing his duties in defendant's employment; that the plaintiff's injuries were the natural and probable consequence of this want of reasonable safety; that the defendant ought to have foreseen that the plaintiff's injuries might probably result from the lack of such reasonable safety; that the defendant's officers represented to the plaintiff that it was not necessary for the plaintiff to serve notice of the injury and of his claim for damages in order to preserve his rights against the defendant; that the defendant's officers represented to the plaintiff that the insurance company was bound to pay plaintiff's damages; that the plaintiff had reasonable grounds for believing from these statements or representations that he was thereby excused from serving a notice of the injuries and his claim for damages; and that the failure to serve the notice was caused by his reliance upon these statements and representations. The damages were assessed at $10,750.

The court denied a motion to change the verdict and for judgment on the verdict as changed, denied a motion for a

new trial, and ordered judgment upon the verdict. This is an appeal from the judgment.

On January 31, 1911, in this court the death of the plaintiff was suggested, and the cause was thereupon revived and continued in the name of *Anna Guile,* executrix, as respondent.

For the appellant there was a brief by *McConnell & Schweizer* and *Woodward & Lees,* and a separate brief by *Quarles, Spence & Quarles,* and oral argument by *C. H. Schweizer* and *A. C. Fish.*

For the respondent there was a brief by *Morris & Hartwell* and *Frank Winter,* and oral argument by *Mr. Winter* and *Mr. Thomas Morris.*

The following opinion was filed February 21, 1911:

SIEBECKER, J. The finding of the jury that the explosion was caused by an electric spark is assailed by appellant as an impossibility under the evidentiary facts of the case, and it is argued that if it be assumed that the explosion could have been caused by such an electric spark then the verdict cannot stand because plaintiff's evidence on this subject is inherently improbable and is impeached by the physical and undisputed facts in the case, and it therefore can furnish no basis for an inference that the explosion was caused in this way. The argument is that the impossibility of an explosion by an electric spark is established because it appears without dispute that the electric light wires within the purifying room were dead, that is that they were not charged with electricity. This is claimed on the ground that the evidence of the defendant's officers and employees showed that no electric current could reach these wires except by a connection made through the switch on the outside of the building, and that it conclusively appeared that the current had been switched off at that point by Mr. Speering early in the evening; that it appeared that no one turned it on before the explosion oc-

curred; and that the darkness of the ceiling and pit lights within the room up to the time the plaintiff entered it to seal the purifying box with water establishes that there was no current on these wires. The evidence on which the appellant relies is, however, contradicted by the facts as testified to by the plaintiff, which tend to show that when he turned the key of the lamp at the wall near the purifying box there was an instantaneous flash and explosion and an immediate collapse of the building. It appears that if an electric spark was emitted from the socket of a lamp like the one in use at this place it was likely to ignite the gas as mixed with air in the room as a result of the blowout.

It is furthermore contended that the evidentiary facts conclusively show that the center lights in this room were intact and would have lighted the room if the outside switch had been turned on, and that the evidence indisputably establishes the fact that these lights were not lighted when the plaintiff entered the room and attempted to turn on the gauge light. True, the witnesses stated that the purifying room was dark. There is also evidence that the room was darkened from the blowout; that there was steam and vapor in the air of the room; that there was no special notice taken of the lights by the witnesses, but that they could see the boxes and where to pour the water to seal the box. This state of the evidence presented an issue of fact as to whether or not the lights were in fact lighted, and whether or not the wires were charged with an electric current. The inferences on this subject were for the jury and the questions were properly submitted to them for determination. Hence we cannot disturb the rulings of the trial court to this effect.

The contention is made that the court should have held as matter of law that the explosion was caused by a lighted torch carried by the plaintiff. The evidence material to this point is conflicting and contradictory, as is shown by the foregoing statement, and presented a question of inferences therefrom

which could only be drawn by a jury and was therefore properly submitted to them. The evidence sustaining the jury's findings on these questions is not of the kind that deals merely in conjecture or bare possibilities, but is direct and positive on the subjects, and from it the jury had the right to infer that the explosion was caused by an electric spark emitted from the socket when the plaintiff attempted to light the gauge lamp.

The jury found that the lighting equipment of the purifying room did emit a spark, that it caused the explosion, and that the appliance, under the facts and circumstances, was not a reasonably safe one for the use of the plaintiff in the performance of his duties. This conclusion appellant does not specifically assail in argument, otherwise than under the foregoing head to the effect that the evidence is insufficient to show that the explosion was caused by a spark. It appears that blowouts frequently occurred in the purifying house and that the air would thereby become charged with gas, creating a highly explosive mixture which a spark could readily ignite, and that such a combination of conditions was known to be very dangerous to persons' safety, in and about the purifying room. It is not disputed but that such an appliance was likely to emit a spark when the current was broken. In the light of these facts it was for the jury to determine whether the electric light appliance, as installed in the purifying house, was, under the circumstances, a reasonably safe equipment in this room. Their verdict on this subject must be accepted in the case as establishing that the defendant did not furnish a reasonably safe equipment for the protection of the plaintiff and others who were engaged to perform services in this room.

The finding of the jury is that within a year after plaintiff's injuries the defendant's officers represented to him that an insurance company was bound to pay him his damages re-

sulting from such injury and that they would enforce such claim for him; that the plaintiff had reasonable cause to believe from such representations that he was excused from serving a notice of injury and for damages within the year from the time of accident in order to preserve his right to enforce any claim for damages against the defendant; and that the plaintiff failed to serve such a notice within the year because he relied on such representations of the defendant's officers. It is urged that the evidence does not sustain these findings of the jury. An examination of the evidence has convinced us that these findings of fact are sustained by the evidence of the plaintiff and his daughter. It was peculiarly within the province of the jury to determine what representations, if any, were made by the defendant's officers in this respect, in view of the sharp conflict between the witnesses testifying on this subject. In resolving these issues of fact the jury accepted the evidence of the plaintiff and his daughter as to what was stated by these officers. Their evidence amply justifies these findings, as incorporated in the special verdict on this branch of the case, and they must be treated as verities in the case.

Upon the verdict the circuit court held that the defendant was estopped from relying on sec. 4222, Stats. (1898). Subd. 5 of this section provides that in actions of this class, notice in writing, properly signed, shall be served on the party alleged to have caused the damage, "stating the time and place where such damage occurred, a brief description of the injuries, the manner in which they were received and the grounds upon which claim is made and that satisfaction is claimed, . . ." and that such notice shall not be deemed insufficient or invalid on account of inaccuracies or failure as to these requirements if it appears that the claimant did not intend to mislead the other party and did not in fact mislead him. The court considered that the conduct of the defend-

ant's officers, as found by the jury, was naturally calculated to justify the plaintiff in remaining inactive in the matter. In this conclusion, as to the effect of such conduct, we concur.

We are brought to the vital question raised by the appeal, namely: Can an estoppel *in pais* arise out of such oral statements and constitute a bar to prevent the defendant from invoking the provisions of subd. 5, sec. 4222, Stats. (1898)? The section is a part of the statutes of limitation. In a former decision of this court (*Arp v. Allis-Chalmers Co.* 130 Wis. 454, 110 N. W. 386) it was declared in respect to this statute that:

"The clause in question is a statute of limitations. [Citing.] True, its operation is somewhat different from the operation of other statutes of limitation in that it acts upon the time within which a preliminary notice shall be served instead of the time within which the summons shall be served, but it is none the less a limitation upon the right to maintain the action."

In *Hoffmann v. Milwaukee E. R. & L. Co.* 127 Wis. 76, 80, 106 N. W. 808, the court, in dealing with the question of whether the exemption of minors from the operation of limitation statutes during minority should apply to these provisions respecting notice in personal injury cases, said:

"The disability statute plainly exempts minors from the operation of the statute limiting the time for commencement of actions only, and has no reference to the statute providing for the service of notice. Counsel has quoted from various decisions of this court to the effect that this law requiring notice is a statute of limitation, and in the sense used by this court in *Relyea v. Tomahawk P. & P. Co.* 102 Wis. 301, 78 N. W. 412, and other cases, it is a statute of limitation in that it imposes a condition upon the right to maintain the action, which must be performed within one year, but is in no sense a limitation upon the time for the commencement of actions, and it is very clear that the disability statute refers only to limitations upon the time for the commencement of actions."

In *Malloy v. C. & N. W. R. Co.* 109 Wis. 29, 85 N. W. 130, in speaking of the enactment of this statute of notice it is stated:

"The court should also consider the legislative purpose, and keep steadily in view 'the mischief to be cured.' [Citing.] Prior to the enactment of this statute a person suffering injury to his person had full six years to commence his action, and he was not required to give any notice of his intention. The necessity of notice arose from the fact that many claims were being prosecuted after long delays, when witnesses had disappeared or the circumstances were forgotten, and the means of evidence had been lost or destroyed. . . . Unquestionably, the legislative purpose was to require the injured party to inform the other within a reasonable time, fixed at one year, of his intention to hold him responsible. If he did so, then he might commence his action any time within six years."

From these cases it is apparent that this provision for notice in this statute of limitation is in its very nature different in purpose and object from the ordinary limitation statute fixing a time within which a person must institute an action to enforce a right. By reason of such differences their operative effect on the rights of persons may well demand the application of different rules of law in their interpretation and administration in order that the benefits they are designed to confer may be secured without inflicting any unnecessary hardships. It is asserted that our statute states what acts of a defendant will estop him from invoking the prescribed statutory bar of limitations, and that the decisions of this court in *Pietsch v. Milbrath,* 123 Wis. 647, 101 N. W. 388, 102 N. W. 342, and other cases establish that a person can be estopped in no other way than that prescribed by and specified in the statute, and that neither accident, mistake, nor fraud can operate to relieve a party from the bar of the statute. We find no cause for deviating from the rules recognized in these adjudications and believe that the rules there declared and applied are the

established law upon the questions there presented, and they are hereby fully approved. An examination thereof, however, discloses that this court has in no case considered and adjudged that a party could not estop himself from invoking the bar of the statute here involved, namely, the failure of the plaintiff to give notice to the defendant in a personal injury action as required by subd. 5, sec. 4222, Stats. (1898). The nature and purpose of the statute have been fully stated above, and it is apparent that these provisions of the statute differ materially in their nature, purpose, and object from the ordinary limitation statutes prescribing a fixed period within which an action must be commenced after it has accrued. The main object is to apprise the defendant of the time and place of injury, to give a description thereof, to inform him as to how it was received, and of the demand for satisfaction of the damages. Every requirement thus imposed is of a nature which the person sought to be charged may willingly forego and therefore readily induce the injured person to believe he will forego, and thus lull him to remain inactive in the matter. Under such circumstances it has ever been deemed that equity should intervene to estop the person who by words or conduct has induced another to refrain from doing that which he would have done but for the action of the former, from asserting the forfeiture of the right he has so induced to the prejudice of the one who gave faith and credit to such conduct. We consider that this principle can justly be applied to parties acting within the provisions of this statute requiring notice of personal injury, and that its operation will be salutary and promotive of justice between the parties under the conditions here presented.

In its import this provision of the statute is analogous to the statutory regulation involved in *Ludington v. Patton,* 111 Wis. 208, 86 N. W. 571, wherein it was declared and held that the statute giving a widow a year after the petition for the probate of her husband's will had been filed for electing to take of her husband's estate such portion as the law pro-

vides instead of that provided in the will, is a limitation statute, which, when it runs, bars her widow's rights beyond the power of relief by legal or equitable remedies, in the absence of fraud entitling her to relief upon the ground of equitable estoppel. It was there held that the widow should be allowed to repudiate the transaction upon discovery of the fraud which induced her not to make the election within the year, and she was given the right to prosecute the executors and trustees and to charge the property of the estate in their possession with a constructive trust for the amount she would have obtained had she made the election. The two statutes serve like purposes and can appropriately be deemed to call for a like relief therefrom in case of default of compliance therewith under the same or similar circumstances. *O'Donnell v. State,* 126 Wis. 599, 106 N. W. 18.

We are of the opinion that the fact that plaintiff's failure to give the notice required was wrongfully induced by the officers of the defendant was shown by the evidence, and that under these circumstances the defendant is estopped from insisting on the plaintiff's default as a bar to the prosecution of his action, and that the plaintiff should be permitted to proceed in the same manner as if the notice had been served as required by the statute. This conclusion, as shown above, is not to be taken as applying to parties who seek relief from the bar of the provisions of the ordinary limitation statutes providing a time within which actions must be commenced after the cause of action has accrued. It is stated in the *Ludington Case,* regarding the benefit of a completed period of a limitation statute within which actions must be commenced after they have accrued, that:

"Courts of equity as well as courts of law, and the legislature as well, are powerless to take that right away, as indicated by this court in *Van Steenwyck v. Washburn,* 59 Wis. 483, 17 N. W. 289."

The court properly awarded judgment on the verdict.

By the Court.—Judgment affirmed.

The following opinion was filed March 14, 1911:

MARSHALL, J. (*dissenting*). I cannot concur in the result in this case, nor in the reasoning upon which it is based. I am unable to find satisfactory evidence that the explosion was caused from turning on the electric light in the purifying room. At best there is the merest conjecture on that point. So the finding that it was so caused violates the rule that he who charges an injury to want of ordinary care on the part of another must prove to a reasonable certainty how the accident occurred and that such want of ordinary care proximately caused it.

Further, on the same subject, it seems that common knowledge condemns as wrong the idea that a spark was emitted at the switch of the electric light, as respondent turned it. There could not possibly have been a spark by merely turning the switch into contact. Only by turning the switch by the contact point so as to break after closing the circuit, could a spark have been made. If the current was on at all, the contact was not broken after having been made, for, in that event, the making and breaking were so near together that the light would not have shown appreciably. Respondent said there was a flash, then an explosion. If there were the two occurrences with an appreciable interval between so as to enable him to remember one separately from the other, the flash was from the incandescence of the filament in the electric lamp. No flash could possibly have been observed from a mere spark at the point of contact in the switch. That was inclosed. If a spark was generated there it was in a substantially tightly inclosed small space. It could not have escaped to attract observation, or, except by merest conjecture, have caused an explosion. If respondent saw a flash and then heard an explosion, and the turning on of the light made the flash, which seems out of all reason, unless the flash was from the incandescence of the filament as aforesaid, the flash could

not have caused the explosion. That and the cause of it must have been simultaneous.

But, if we were to concede turning the switch to have caused a spark in some way, which no one can explain with reasonable clearness, and that the spark generated in the socket caused the explosion, yet what reason is there for saying the purifying room was not reasonably safe? Actionable negligence is based on failure to exercise ordinary care—such care as the great mass of mankind exercise under the same or similar circumstances. That seems to have been ignored in this case, and the jury allowed to efficiently say the purifying room was not reasonably safe, merely because they believed the turning on of the electric light was an event liable to occur and that it caused the explosion. They set up their own standard instead of finding the fact by the legal standard. There is no room in the evidence, so far as I can see, for even a suspicion that the purifying room was not up to the ordinary standard of safety. It was common to have some way of furnishing light in the room when necessary. That is evident. The inclosed electric light was the safest that could have been thought of. It was armed with an outside switch so the current could be turned off outside the building, the contact then made at the lamp, and the current then turned on, avoiding any possibility of causing a spark of fire by closing and breaking the current in the purifying room. How then can it be said appellant wronged respondent by not providing a reasonably safe purifying room? I am satisfied from the record that the jury did not and could not, reasonably, have found the room not to be as safe as such rooms are ordinarily made. They simply concluded there was an explosion; that it was caused by the electric light and so was not reasonably safe. The court plainly instructed that if the purifying room was up to the ordinary standard of safety that was sufficient. The jury must have ignored that. If there is any evidence in the record to show that it was not as

safe as common, I am unable to find it. My brethren do not point to any.

Now a word respecting the statute of limitations. It is conceded that the law requiring notice of an injury to be served within a given time in order to preserve the right to maintain a cause of action for it, is a statute of limitations. It has long been so classed without a suggestion, heretofore, that the ordinary principles applicable to such statutes do not apply. It is conceded that there is, in general, no way under our system of avoiding a limitation statute on the ground of estoppel *in pais;* that after the expiration of the statutory period bearing on a cause of action, the claim or demand is as though it had never been; that it is to be regarded as having been extinguished by the statute, leaving no relief whatever from such situation. *Pietsch v. Milbrath,* 123 Wis. 647, 101 N. W. 388, 102 N. W. 342. Not only is one right extinguished but a new one is created, which, like any other, is within constitutional guarantees against impairment. That is the settled policy of this state. The court recognizes it in the opinion and does not, in general, intend to vary it or cast doubt on its wisdom.

In view of the foregoing, it seems somewhat strange that an important principle of public policy should, at this late day, be discovered to be subject to an exception which will save the cause of respondent. The importance of certainty in our law cannot be overestimated. Unless statutes to vitalize a single policy are uniformly construed most prejudicial confusion will result. The maxim well applies, *Ubi jus incertum, ibi nullum.*

The saying is, that bad cases make bad law and so it seems sometimes. No disrespect at this point to my brethren. What looks like bad law to some may well look like good law to another, and what looks like bad law upon one occasion is liable to take on a different aspect later on, and *vice versa.*

Hence the reason that persons in high stations charged with the duty of jointly declaring and applying the law should avoid the slightest semblance of want of fairness to the opinions of each other.

Dealing with the very statute in question, the court, in *Hoffmann v. Milwaukee E. R. & L. Co.* 127 Wis. 76, 106 N. W. 808, where the right of an infant was involved, and it was insisted that the law should be construed as excepting such during the period of their minority, the reply of the court was: "No exception is made in favor of minors in this statute and none can be engrafted upon it by the courts." That case and others give such statute all the characteristics and effects of statutes of limitations in general, as to which neither fraud, ignorance, nor disability, other than the statute expressly specifies, applies to prevent its running to effect or prevents its being pleaded with effect after having run. That is plainly the doctrine of *Pietsch v. Milbrath, supra,* which has been firmly entrenched in our policy. It has become a rule of property. It is the better rule if it is good policy to have limitation statutes at all. It is well supported elsewhere, though, true, it is not the universal rule. This court in speaking of it in *State v. C. & N. W. R. Co.* 132 Wis. 345, 112 N. W. 515, said:

"The presence of fraud in no instance postpones the running of the statute from the time the cause of action accrued, save the specified exception in subd. 7, sec. 4222, Stats. (1898), for relief on the ground of fraud in cases which before February 28, 1857, were cognizable solely by courts of chancery."

Again in *Uhlenberg v. Milwaukee G. L. Co.* 138 Wis. 148, 119 N. W. 810, the foregoing unbending unexceptional character was treated as the absolute essential of the statute. It was emphatically referred to, it being said in effect that there is no way of escape from its full effect so long as it remained on the statute books unchanged by the lawmaking power.

The only justification for the exception which the court now makes to the principle so firmly established, is that the reason for the particular statute is different from that of statutes in general; but the logic of that to my mind is infirm and obviously so. The reason for statutes of limitations; common to all, is phrased in 25 Cyc. 983, thus:

"The object . . . is to suppress fraudulent and stale claims from springing up at great distances of time and surprising the parties or their representatives when all the proper vouchers and evidences are lost or the facts have become obscure from the lapse of time or the defective memory or death or removal of witnesses."

Singularly enough the language in *Malloy v. C. & N. W. R. Co.* 109 Wis. 29, 85 N. W. 130, used to show that the statute in question was intended by the legislature as a statute of limitations because the thought was to cure the species of mischief at which statutes of limitations in general are aimed, is taken hold of now to show that such reason, while leaving the statute one of limitations, is to be regarded as taking it out of the most dominant principle of all statutes of the kind. That is to say, the reason which the court assigned in the beginning for holding the legislature intended the statute to be, in principle, a statute of limitations is leaned on now for support in taking it out of the essential principle thereof. It seems to me that if such statutes, of which there are many, are to vary in principle according to particular classes of situations they are designed to reach,—instead of being dominated by one principle,—are to be subject to such exceptions as the court in its wisdom may conclude to be equitable,—great confusion will result and the court will really usurp the functions of the legislature. When the reason for a particular act, and acts of the same general character, is the same they should have a common effect. That is but another way of stating an old maxim in the law, *Ubi lex est specialis, et ratio ejus generalis, generalitur accipienda est.*

The idea of the last foregoing is this: The characteristics of a statute of limitations having been fixed in this state many years prior to the enactment of the one in question, it must be presumed that it was the policy of the lawmaking power to incorporate such characteristics therein. It should be regarded so incorporated as plainly as if plainly expressed in words. The statute is not one of limitations merely because this court named it such. It is such because the legislature made it so and, of course, did it in view of established principles.

So I cannot see any logic in the judgment from which I dissent, in the court's suggestion that:

"By reason of such differences [differences which, as we have seen, do not exist in fact] their operative effect on the rights of persons may well demand the application of different rules of law in their interpretation and administration in order that the benefits they are designed to confer may be secured without inflicting any unnecessary hardships."

I cannot agree that the court can properly recast a law enacted within an established principle to minimize its effect according to judicial notions of equity giving "different operative effects on the rights of persons" of different acts, dominated by one broad policy. If a law is obscure it may be construed to effect the discovered intent, if after all such intent can be found expressed. If it be not obscure the court cannot interpret and administer in the manner stated without invading the legislative domain.

I cannot well leave discussion of the case without calling attention to the, seemingly, plain illegitimate use of *Ludington v. Patton,* 111 Wis. 208, 86 N. W. 571,—moreover of the language suggestive of having been substantially taken from the decision in that case, indicating that the effect of a statute of limitation, in general, may be obviated by equitable estoppel. Such language unconsciously perverted what was there decided, most harmfully.

It is agreed, I am sure, as to what has been the law of this state. The court has declared it in the cases I have cited and they are approved in the opinion of the court now, and understandingly, I have no doubt. Yet the purport of *Ludington v. Patton, supra,* is given an unwarranted cast *apparently* in conflict with *Pietsch v. Milbrath,* 123 Wis. 647, 101 N. W. 388, 102 N. W. 342, which is cited and approved. I am afraid the court's opinion will be read as approving a principle in the latter and justifying a departure from it by quoting, in a misleading way, from the decision in the former; not only creating an apparent conflict, where none exists in fact, but with seeming unconsciousness of the inconsistency. I most fully acquit my brethren of so intending while, necessarily, taking the liberty to respectfully state the situation as it appears to me and as I think it will appear to the bench and bar, and also to my brethren themselves, on more careful study of the matter. The fact is, as I must say, *Pietsch v. Milbrath* and *Ludington v. Patton* are in perfect harmony and I think the perverted use of the latter case in the way it appears is a clear oversight.

This is the court's language, referring to the *Ludington Case:*

"Wherein it was held and declared that the statute giving a widow a year after the petition for probate of her husband's will had been filed for electing to take of her husband's estate such portion as the law provides instead of that provided in the will, is a limitation statute, which, when it runs, bars her widow's rights beyond the power of relief by legal or equitable remedies, *in the absence of fraud entitling her to relief upon the ground of equitable estoppel.*"

That language is wholly a new expression. The original does not convey the idea suggested of it, and I venture to say the court does not think otherwise and that it was used without carefully studying the logic of the decision.

Here is the language of the case:

"It must be admitted that such statute should be given the same force and effect as any other statute of limitations." (Note the care to repudiate the idea that any different effect can be given to such statute than any other.) "There are no two rules governing such statutes. Equity deals the same with one as with another. It must be held, when fully run in a given case, to have absolutely extinguished the right upon which it has operated, and created in those in whose favor it has run a new right of equal dignity, as regards legal and equitable cognizance, with the one displaced by law."

Can anything be plainer? The court thus closed the discussion:

"Such being the case, the statute in question must be enforced to its full effect, the same as any other limitation act, regardless of the hardship thereby inflicted in any particular case, *unless circumstances exist precluding its being insisted upon under the doctrine of equitable estoppel.*"

Thus it will be seen words carefully used to, for the time, save a question, have been inadvertently turned into language in the court's opinion now, in effect, suggesting that such question was raised and decided contrary to the spirit of all which preceded it and all which followed it in that and subsequent cases. It will be easily seen that "unless circumstances exist precluding its being insisted upon under the doctrine of equitable estoppel" conveys a very different idea than "in the absence of fraud entitling her to relief upon the ground of equitable estoppel." We hardly need suggest, in passing, that even the question raised, as we have seen, was soon after decided against there being any way of escape from the statute on the ground of equitable estoppel and that has been affirmed and re-affirmed and is now again re-affirmed with an exception to fit the particular situation, and similar situations in the future, overturning the doctrine of all the cases that, as said in the *Ludington Case:* "There are no two

rules governing such cases." I cannot look at the matter differently, but hope I state it respectfully.

I should further remark as to the *Ludington Case,* after language quoted practically closing the branch of the case to which it appertained, that the rest of the opinion strongly suggests the impossibility of any defense of estoppel against a limitation statute. The recovery was based on the theory of giving full effect to the statute and holding the defendants liable as trustees for the property they acquired title to through their fraud. They were her confidential advisers and trustees, legally and morally, from the start. They took advantage of their positions, dealing with her, ostensibly, in her interest, but. actually, to obtain an advantage for themselves and those they represented. In that situation, while the statute was regarded as giving them title, the general principles of equity were held to give them the status of trustees for the one they had wronged with obligation to account to the amount of their enrichment through fraud.

So it will be seen how very far the *Ludington Case* is from the facts of this case. Here there was no trust obligation. Appellant had no property of respondent obtained through fraud or otherwise. This was not even an action for damages on the ground of fraud or to enforce a trust created by fraud, even if, in any event, such an action would lie on the facts here. So in any view the sole authority cited by my brethren in support of the decision from which I dissent is entirely foreign to it.

METROPOLITAN CASUALTY INSURANCE COMPANY, Respondent, vs. CLARK and another, Appellants.

February 1—February 21, 1911.

Common law: Changes: Animals: Liability of owner for trespasses: Runaway on street: Negligence.

1. Viewed objectively and at large as a system of principles deducing from litigated instances just, reasonable, and consistent rules of decision suitable to the genius of the people and to their political, social, and economic conditions, the common law never changes; but the rules so deduced are subject to change in detail to conform with progress and change in such conditions.
2. The common-law absolute liability of the owner for trespasses of cattle escaping from his field is in force in this state, modified by statute.
3. This absolute liability for trespass of such animals does not exist where, being lawfully driven along the highway, they escape from the custody of the owner. In such a case the owner is liable only if negligent.

APPEAL from a judgment of the circuit court for La Crosse county: JAMES WICKHAM, Judge. *Reversed.*

J. E. Higbee, for the appellants.

For the respondent there was a brief by *Bunge & Bosshard,* and oral argument by *George W. Bunge.*

TIMLIN, J. The plaintiff corporation executed a policy of plate glass insurance on property abutting upon a highway. The plate glass was broken by defendants' team of horses, which, running away, dashed into the plate glass window. The plaintiff replaced the plate glass at an expense of $104, took an assignment of their right of action against the defendants from the owners of the plate glass window, and brought this action for damages, charging the defendants in two separate counts with trespass and with negligence.

The jury by its verdict acquitted the defendants of negligence. There was, however, uncontroverted proof that the

defendants owned the horses and that there was damage done to the amount of $104. Allowing the verdict to stand, the circuit court rendered judgment for the plaintiff for this sum on the ground that defendants, being the owners of the horses, were liable for the damage caused by such horses without any negligence on the part of the owners, deducing this rule of liability from *Chunot v. Larson,* 43 Wis. 536; *Pettit v. May,* 34 Wis. 666; *Bulpit v. Matthews,* 145 Ill. 345, 34 N. E. 525, 22 L. R. A. 55; *Wood v. Snider,* 187 N. Y. 28, 79 N. E. 858; *Hazelton v. Week,* 49 Wis. 661, 6 N. W. 309; 2 Cyc. 376.

It appeared that the horses were in charge of an experienced driver, but took fright, became unmanageable and beyond the control of the driver, and ran away, all in the highway, and in their flight on the street they ran upon the sidewalk in front of the building in question and into the plate glass window.

The case is presented with commendable industry and ability. The appellants attack and respondent defends the ruling of the court below, each appealing to what he terms common-law rules in support of his position. That law being in a degree progressive, the term "common law" is somewhat ambiguous, for the common law of the seventeenth century is not in all details that of the nineteenth, nor the common law of England in all details that of the United States, nor the common law of one state in all details that of another. This difference in detail is frequently all-important and decisive of the particular case under consideration. The constitution of this state (sec. 13, art. XIV) provides that such parts of the common law as are now (1848) in force in the territory of Wisconsin not inconsistent with this constitution shall be and continue part of the law of this state until altered or suspended by the legislature. Viewed objectively and at large as a system of deducing from litigated instances just, reasonable, and consistent rules of decision suitable to the genius of the people and to their political, social, and economic condi-

tions, the common law never changes; but with reference to the rules so deduced we may say with Francis Bacon: "As waters do take tincture and taste from the soil through which they run, so do laws vary according to the region where they are planted though they proceed from the same fountains."

A rule of the common law which has come down to us practically unchanged made it the duty of every man to keep his cattle (herbiverous domestic animals) within the limits of his own possessions. If he failed to so keep them he failed in duty, and when they strayed upon the land of another the owner was chargeable with a trespass. Nor did his liability for the mischief done by them depend in any degree upon his personal fault, since, if the cattle escaped from his custody notwithstanding due care on his part, his responsibility for the injury committed by them was the same that it would have been had he voluntarily permitted them to roam at large. 2 Cooley, Torts (3d ed.) 684 (*397); Bigelow, Torts (8th ed.) 459; 2 Jaggard, Torts, p. 662. This rule of the common law was recognized in Wisconsin in the early case of *Stone v. Donaldson,* 1 Pin. 393, and also in *Harrison v. Brown,* 5 Wis. 27. The liability still exists in this state, but subject to conditions imposed by statute. *Walls v. Cunningham,* 123 Wis. 346, 101 N. W. 696. A learned review of the common law on this subject and the reasons upon which the rule was based will be found in the opinion of Justice Doe in *Brown v. Collins,* 53 N. H. 442. The rule itself appears to have been founded on ancient analogies and on the known propensities of such animals to stray, crop the herbage, destroy trees, etc., and in part on the forms of action made imperative by the ancient common law. There grew up, however, not without some struggle, a supplementary rule of the common law limiting the liability of the owners for damages caused by such animals, when, being lawfully driven upon the highway without negligence on the part of the owner or his servant in charge, they escaped from control and tres-

passed upon property abutting on the highway. Cooley speaks of it as an exception to the common-law rule that every man at his peril must keep his beasts from the lands of others:

"If one is driving his domestic animals along the public highway, he is bound to observe due care, and if, notwithstanding he is guilty of no negligence, they escape from him and go upon private grounds, he is not responsible, provided he removes them within a reasonable time." 2 Cooley, Torts (3d ed.) 690 (*401).

"A person whose horses, frightened by a locomotive, became uncontrollable, ran away with him, went upon land of another, and broke a post there, is not liable for the damage if it was not caused by any fault on his part." *Brown v. Collins,* 53 N. H. 442.

"An ox belonging to the defendant and while being driven by his servants through the streets of a country town entered the plaintiff's shop, which adjoined the street, through the open doorway and damaged his goods. No negligence on the part of the persons in charge of the ox was proved. Held, that the defendant was not liable." *Tillett v. Ward,* L. R. 10 Q. B. Div. 17.

In the case last cited COLERIDGE, C. J., says:

"Persons who have property adjacent to a highway may be taken to hold it subject to the risk of injury from inevitable risk. . . . The accident to the plaintiff was one of the necessary and inevitable risks which arise from driving cattle in the streets in or out of town."

This exception to the common-law rule referred to, or supplementary rule of the modern common law, whichever it may be called, is recognized in Wisconsin. It is said in *Harrison v. Brown, supra:*

"It is further conceded, that the alleged trespass was committed by the hogs escaping through the fence while running at large and depasturing in the highway, and not in consequence of breaking into the close, while being driven along the same *in transitu.*"

The court seemed to think it was necessary to draw this distinction. See, also, *Van Roy v. Watermolen,* 125 Wis. 333, 104 N. W. 97. This is also supported by *Roche v. Milwaukee G. L. Co.* 5 Wis. 55, and *Fahn v. Reichart,* 8 Wis. 255. In the latter case it is said:

"A possible damage to another in the cautious and prudent exercise of a lawful right is not to be regarded, and if a loss is the consequence, it is *damnum absque injuria.*"

See, also, *Wood v. Snider,* 187 N. Y. 28, 79 N. E. 858, 12 L. R. A. N. S. 912, and cases in note; 1 Thomp. Comm. on Neg. §§ 1294, 1297; 18 Am. & Eng. Ency. of Law (2d ed.) 588; *Erdman v. Gottshall,* 9 Pa. Super. Ct. 295. The case of *Chunot v. Larson,* 43 Wis. 536, chiefly relied upon in the court below to support the decision, is not in point. That case falls under a different rule of law.

By the Court.—Judgment reversed, and the cause remanded with directions to enter judgment for defendants.

HERLITZKE, Respondent, vs. LA CROSSE INTER-URBAN TELEPHONE COMPANY, Appellant.

February 1—February 21, 1911.

Negligence: Personal injuries: Telephone wire hanging across highway: Evidence: Instructions to jury.

1. In an action for injuries to a traveler on a highway, caused by a telephone wire hanging loosely across the highway within a few feet of the ground, a finding by the jury that such position of the wire was due to negligence on the part of defendant is *held* to be sustained by the evidence.
2. Trial courts are not required to adopt any particular phrasing of a rule of law given to the jury, and the mere refusal to give a requested instruction which correctly states the law is not error if it is in fact embodied in substance in the general charge.

APPEAL from a judgment of the circuit court for La Crosse county: GEORGE GRIMM, Judge. *Affirmed.*

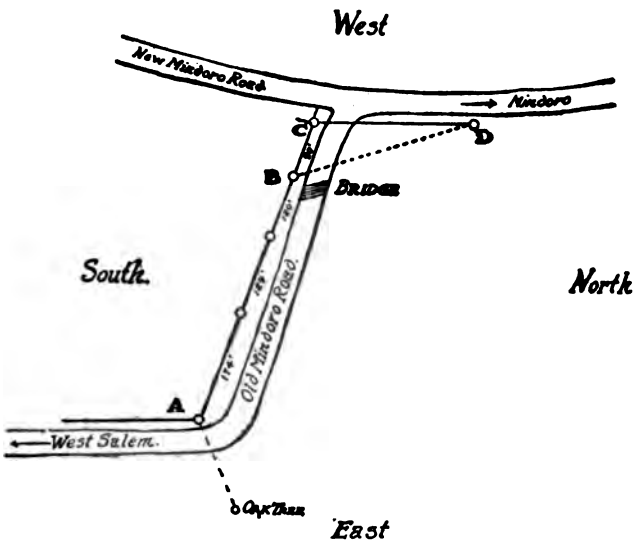
Action for personal injuries. On June 3, 1908, the plaintiff was being driven over one of the public highways of La Crosse county, Wisconsin, known as the old Mindoro road, when the top of her buggy was caught by a telephone wire of the defendant company, which hung loosely across said highway, causing the horses to become frightened and run away, and injuring the plaintiff. The jury by special verdict found (1) that the low position of the telephone wire across the highway at the time and place of the injury was due to a want of ordinary care on the part of the defendant; (2) that such want of ordinary care on its part was the proximate cause of the injury; (3) that plaintiff was not guilty of any want of ordinary care; and (4) damages. From a judgment entered on such special verdict the defendant appealed.

For the appellant there was a brief by *McConnell & Schweizer,* and oral argument by *C. H. Schweizer.*

J. E. Higbee, for the respondent.

VINJE, J. The defendant earnestly contends that there is no evidence to sustain the finding of the jury that the low position of the telephone wire across the highway was due to any want of ordinary care on its part. Some distance south of the place of the accident the highway ran in a northerly direction with the telephone line on its west side. It then turned nearly west, making almost a right angle, the telephone post at which point will hereafter be designated as A, and ran in a westerly direction for about 500 feet, with the telephone line on the south side; then again in a northerly direction, making little more than a right angle, the telephone pole at which point will be designated as C. At the point C the line crossed the road and continued on the east side thereof. The first pole east of C will be known as B, and the

first pole north of C as D. From this it will appear that a line connecting B, C, and D would form a triangle with the right angle at C, and that if the wire should become detached from C it would hang from B to D, and across the road east of where it would if hung from C to D. A short distance east of the point where the wire hanging from B to D would cross the road is a bridge. Plaintiff was being driven in a



westerly direction, and just beyond the bridge the wire caught the buggy and the injury occurred. The pole at the point A was guyed by a wire running across to the east side of the road, and defendant's theory, supported by evidence, was that this guy wire was struck by a heavy oak limb the night before, causing the pole to straighten up and so produce a tension on the wire from A to C, breaking or pulling off the insulator at C and so allowing the wire to hang from B to D. The wire was not wound around the insulator, but tied thereto by a separate wire, thus allowing a stretching of the wire from A to C.

Plaintiff's theory, also supported by evidence, was that the pole C was so decayed and worn that it either broke off entirely or else bent to the east sufficiently to give enough slack to permit the wire to come within four or five feet of the ground where it crossed the highway. Defendant's manager testified that about three years before the accident he inspected the pole C and found it then somewhat decayed, about half an inch of rot. He put guy wires on it for the purpose of holding it in position. After that no inspection was made of the pole as to soundness or sufficiency up to the time of the injury. There was a conflict in the evidence as to whether or not it was then standing.

It is apparent from the above description of the line that the pole C was subjected to an unusual amount of strain, and that if the wire should become disconnected from it, or if the pole should be pulled out of position in the direction of the strain on it, the wire would in all probability interfere with and endanger public travel on the highway. There was evidence to show that sometime after the injury occurred the pole was found lying on the ground near where it had stood and that it was very rotten at the butt. One witness testified that "when they sawed it off they broke off a lot of rotted places, and coming home in the machine some more were broken off. . . . It was weak like all rotten wood."

In view of the whole evidence, and taking into consideration the necessity for a strong pole at C and the testimony to the effect that it was somewhat rotten three years before the injury occurred; that it had not been inspected since; and the evidence as to the condition of the pole found there shortly afterwards, as well as the apparent peril to travel from any sagging of the wire where it crossed the highway, we cannot say that the jury were not warranted in finding negligence on the part of the defendant. It was its duty to be reasonably vigilant in the inspection of its line, and especially so at a place such as the one in question where the

peril to travel resulting from a sagging of the wire was so obvious. It must be admitted that the theory of the defendant as to what caused the wire to sag was more or less plausible and supported by evidence, but it was peculiarly the province of the jury to determine, under the conflicting evidence, what was in fact the real cause of the injury. Plaintiff's theory was at least equally plausible, and, as we have said, supported by evidence sufficient to sustain the verdict. In such a situation the finding of the jury is conclusive. *Kortendick v. Waterford,* 135 Wis. 77, 115 N. W. 331.

Defendant assigns error because the court refused to give the following instruction in connection with question 1 of the special verdict:

"You are not permitted to guess at your verdict in answering this question nor in answering any other question in this verdict herein. Verdicts must be based on evidence, not on mere conjecture, and unless you are satisfied to a reasonable certainty that the low position of the telephone wire across the highway at the time and place of the injury was due to a want of ordinary care on the part of the defendant company in constructing and maintaining its telephone line at the point in question, you are instructed to answer this question 'No.'"

The court in its charge to the jury fully and fairly stated the defendant's theory of the case and, in connection with its instruction on the first question of the special verdict, said:

"You should bear in mind that it is not necessary for the defendant to prove that it exercised ordinary care. On the contrary, the duty rests entirely on the plaintiff to prove that it did not, and that its failure in that regard was the cause of the wire being in the fallen and dangerous condition shown by the evidence at the time and place of the injury."

The jury were further instructed relative to this question that before they could answer it in the affirmative they must be satisfied to a reasonable certainty from a preponderance of the evidence that the falling and lowering of the pole line re-

sulted from a defective condition thereof, which, in the exercise of ordinary care, the defendant ought not to have permitted to exist; that the burden of proof was upon the plaintiff; and that the jury must answer the question in the negative unless convinced to a reasonable certainty by a preponderance of the evidence that it should be answered in the affirmative.

While it is true that the portion of the charge quoted does not in express terms say that the jury cannot base their verdict upon mere conjecture or that they are not permitted to guess, still we think the only reasonable inference that sensible men could draw from the charge given would be that they must base their verdict upon the testimony in the case, and that from such testimony they must be satisfied there was a want of ordinary care on the part of the defendant before the question could be answered in the affirmative. Trial courts are not required to adopt any particular phrasing of a rule of law given to the jury, and error cannot be predicated upon the mere refusal to give a requested charge which correctly states the law, if it is in fact embodied in substance in the general instructions given. *Jones v. Monson,* 137 Wis. 478, 488, 119 N. W. 179.

By the Court.—Judgment affirmed.

STATE EX REL. TOWN OF HAMBURG, Appellant, vs. BOARD OF SUPERVISORS OF VERNON COUNTY, Respondent.

February 2—February 21, 1911.

Bridges: County aid: Petition after completion of the work.

Under sec. 1319, Stats. (1898), the county board has no power to levy a general county tax to pay one half of the cost of a town bridge, upon a petition filed by the town board after the bridge has been constructed, even though two members of the county board, theretofore appointed by the chairman, acted with the town board in the letting, inspecting, and acceptance of the work.

APPEAL from a judgment of the circuit court for Vernon county: E. C. HIGBEE, Circuit Judge. *Affirmed.*

Mandamus action to compel defendants to levy a tax. The petition, alternative writ, return, and evidence raised the question of whether under sec. 1319, Stats. (1898), after construction of a town bridge, the county board of the county of which such town formed a part can appropriate money to pay one half the cost thereof, the same to be levied upon the taxable property of the county and when collected be paid out of the county treasury on the order of the chairman of the county board and clerk, upon their being notified by the town that the bridge has been completed and accepted.

In this case the chairman of the county board, upon application of the chairman of the town board, appointed two members of the former to act as a bridge committee with the latter. Thereafter such pretended committee and the town board contracted for the bridge. The bridge was constructed pursuant thereto in the spring of 1905. In November, some seven months after the contract was let and long after the bridge was completed, the town board for the first time, petitioned the county board under sec. 1319 aforesaid to appropriate one half the cost thereof. The board, in form, granted

the petition. Thereafter, in a taxpayer's suit in the circuit court for the county the levy was declared void, judgment being duly entered. At the regular meeting of the county board the following year the town board of supervisors petitioned the former to appropriate as before and the request was denied. This proceeding was then commenced pursuant to direction of the electors given at a regular town meeting.

The trial court held that the judgment in the taxpayer's action did not preclude granting the petition, but that the statute did not authorize a county appropriation on petition of the town made after construction of the bridge.

Judgment was rendered accordingly in favor of the defendant.

William S. Burroughs, for the appellant.

C. W. Graves, acting district attorney, for the respondent.

MARSHALL, J. The judgment must be affirmed. It turned on a question of power. Sec. 1319, Stats. (1898), gives the county board of a county, under specified conditions, competency to levy a tax on all the taxable property thereof for the purpose of paying one half the cost of constructing a town bridge. The dominant conditions are: (a) the town must first provide one half the cost of the bridge; (b) before proceeding to contract for the work the town must file its petition with the county board setting forth the fact as to its having proceeded as aforesaid, and others specified; (c) the county board must act upon such petition, granting the same if it satisfies all calls of the statute, and at the same time appoint two of its members to act as commissioners with the town board in letting, inspecting, and accepting the work.

Thus it will be seen no such thing as was contemplated in this instance, is within the statute. No authority is conferred thereby to levy a general county tax to aid in erecting a town bridge after its construction, and except concurrent with appointment by the county board of two of its own mem-

bers to represent the county in respect to administering the matter inclusive of making the agreement for the erection.

The statute goes quite to the limit of power to levy taxes upon one of a group of subdivisions of the state forming a major public corporation for the benefit of a minor one. For that reason, as well as on general principles, the extent of the power must be regarded as measured by the precise terms of the law. No equitable considerations will warrant the court in coercing the county to go further than the written specifications prescribed by the legislature.

By the Court.—The judgment is affirmed.

FIRST NATIONAL BANK OF ANTIGO, Respondent, vs. WUNDERLICH, Appellant.

February 2—February 21, 1911.

Contracts, when complete: Conditional delivery: Guaranty: Revocation: Questions for jury: Continuing guaranty: Discharge by renewal of note: Trial: Order of proof: Rebuttal: Discretion.

1. The fact that a contract of guaranty in the plural form and having at its foot blanks for the signatures of two guarantors is signed by only one person at the time of its manual tradition, is not conclusive that it is an incomplete instrument. Upon the evidence in this case the question of the binding effect of such instrument on the signer was for the jury.
2. Where a writing, signed by one person only, in terms guaranteed payment of sums to be advanced by a bank to another person, evidence that the signer afterwards insisted to the cashier of the bank that he had delivered the instrument with the understanding that it was not to become binding until signed by his brother, and that upon being informed as to the amount already advanced on the faith of the guaranty he forbade any further advances, does not show a revocation of the instrument as to sums already advanced or require submission of that specific question to the jury.

3. Where by its terms a guaranty is continuing in its nature and covers all sums to be advanced by a bank to a certain person and all notes given for sums so advanced, up to a certain amount, the guarantor is not discharged by renewal, without his knowledge, of notes so given and extension of the time of payment thereof.
4. Refusal of the trial court to permit a witness for defendant to testify on rebuttal on the question of the delivery of the instrument in suit, is *held* in this case not an abuse of discretion.

BARNES, J., dissents.

APPEAL from a judgment of the circuit court for Wood county: CHAS. M. WEBB, Circuit Judge. *Affirmed.*

This is an action on a contract of guaranty signed by the defendant. By its provisions the defendant guaranteed the payment of the indebtedness of J. N. Sanford to the bank to an amount not exceeding $1,000. The principal questions were whether the guaranty was delivered absolutely, or conditionally upon its being also signed by Chris. Wunderlich, a brother of the defendant; whether it was revoked by the defendant; and whether part of the indebtedness of Sanford to the bank was incurred after the defendant had instructed the cashier of the bank not to increase Sanford's loans.

The guaranty was drawn up by the defendant's attorney at the request of Sanford and is as follows:

"*To the First National Bank of the City of Antigo, Wisconsin:*

"For value received, we, the undersigned, hereby guarantee the payment of all future sums of money advanced by you to J. N. Sanford, and guarantee the payment of all notes executed by him to said *First National Bank,* for loans or sums advanced to him in any amount not to exceed the sum of one thousand ($1,000) dollars.

"This guarantee shall not be affected by any other guarantee you may have or other securities so far as the same shall be for the security of any sum in excess of the amount above named.

"In witness whereof, we have hereunto set our hands and seals this 8th day of May, 1905.

.....(Seal)
"GEO. H. WUNDERLICH. .....(Seal)

"In presence of W. B. McArthur."

The exact date of the guaranty is in dispute, but it was signed in the first part of May, after banking hours, in the bank, in the presence of the attorney, Sanford, and the cashier of the bank. The defendant testified that it was delivered to the cashier and was to become effective only when signed by the defendant's brother. The cashier and Sanford gave evidence that it was delivered absolutely as a guaranty, that the defendant after its acceptance by the bank stated that his brother would also sign it, and that the bank on the same day advanced money to Sanford as a loan on the guaranty. Thereafter the defendant and his brother went to the bank. The brother of the defendant at that time refused to sign the guaranty and they both asserted and protested that the instrument had not become effective. The cashier of the bank testified that he informed the brothers that he understood and considered it to be in force and binding and also informed them of the amount of Sanford's indebtedness. The cashier testified that he was then instructed by the defendant not to increase the amount of Sanford's loans. The defendant testified that he went to the bank to obtain the return of the guaranty signed by him and that the cashier informed him that it had been misplaced and for this reason it was not delivered to him.

On April 29, 1905, the bank loaned Sanford $200; on May 10, 1905, $300; and on June 16, 1905, $300 on his notes. These notes were renewed at the bank by Sanford without the knowledge of the defendant. This action is to recover the amounts due on the renewed notes.

The defendant testified that he made the second visit to the bank on the day following or on the second day after he signed the guaranty. The defendant's brother testified that this visit was not more than two or three days after the guaranty was signed by his brother. The cashier of the bank testified that the second visit was made in the latter part of June.

The jury rendered a general verdict in favor of the plaintiff, which covered the amounts due on the loans of April 29, 1905, and May 10, 1905, and disallowed recovery for the $300 loaned on June 16, 1905. The defendant appeals from the judgment on the verdict in plaintiff's favor.

For the appellant there was a brief signed by *T. W. Hogan,* who also argued the case orally.

For the respondent there was a brief by *Henry Hay,* attorney, and *Goodrick & Goodrick,* of counsel, and oral argument by *Mr. Hay.*

SIEBECKER, J. The defendant contends that at the time the instrument was delivered to the cashier of the plaintiff bank he informed the cashier and it was mutually understood that the guaranty was not to become effective and binding until the defendant's brother had signed it, which he was expected to do within a day or two. This is controverted by the evidence of the cashier and Sanford, who assert that no such provision or condition was stated by the defendant. They assert that the delivery of the guaranty was unconditional and that the parties understood that it then became effective. It was a question for the jury to say whose version was correct. They found that the parties intended that it should be effective from the time of delivery.

It is argued that the form of the instrument shows on its face that it was an incomplete and partially executed contract, in that it is in the plural form and at the foot has two

blanks for the signatures of two guarantors, and that the cashier knew that only one had signed it. These were evidentiary circumstances to be considered in connection with the other evidence on the question, but they do not of themselves show that the instrument was not an executed and complete contract when so delivered to the cashier. The fact that a contract in the plural form is signed by only one person at the time of its manual tradition is not conclusive that it is an incomplete instrument. Contracts of such form may be and often are treated by the parties thereto as complete, effective, and binding on the subscriber. 1 Randolph, Comm. Paper, § 87. The binding effect of this contract, under the facts shown, was a question to be tried out before the jury on the evidence adduced.

It is urged that the guaranty was revoked and that the court erred in not specifically submitting that issue to the jury. We have examined the evidence on which reliance is placed to show a revocation. The claim is that the defendant revoked it shortly after the cashier received it into his possession, at the interview with the cashier after defendant's brother had refused to sign it. True, the defendant insisted to the cashier at this meeting that he had delivered the instrument with the understanding that it was not to become effective and binding until the brother had signed it, but the evidence fails to show that he revoked it. Indeed, this would have been inconsistent with his claim that it was never in force. The cashier testified denying that anything concerning a revocation had occurred, but asserted that the defendant at this interview asked what amount the bank had advanced to Sanford in reliance on the guaranty, and upon informing him thereof the defendant forbade him advancing any additional amount. The jury found this to be true and therefore disallowed recovery for the $300 loaned on June 16, 1905, on the evident theory that this sum was loaned to San-

ford after the defendant had directed the cashier not to loan him any additional sum. The submission of this question embraced all the issues of fact presented by the evidence on this branch of the case, and hence no errors were committed respecting an alleged revocation.

The further contention is made that the defendant was discharged from the obligation to the bank for all sums so advanced on the faith of the guaranty by the renewal of the notes and the extension of the time of payment without his consent or knowledge. This claim is asserted upon the ground that he as guarantor is secondarily liable and that such renewals and extensions of the time of payment operated to release him. The contention overlooks the continuing nature of the guaranty. By it the defendant guaranteed payment of all future sums advanced and the payment of all notes executed to the bank for sums advanced in any amount not to exceed $1,000. It seems clear to us that the guarantor undertook to pay any sums due on any notes up to $1,000 and that the renewed notes were embraced in such promise.

The guaranty recites that it was given for value and there is no evidence to contradict the recital; hence the court correctly held that there was no issue raised on this point.

An exception is urged to the ruling whereby the witness Hogan was precluded from testifying in rebuttal on the issue of the delivery of the instrument. The trial court held that the defendant should have offered to show this fact by this witness when he had the case, and that the offer came too late on rebuttal. There was no abuse of discretion in this ruling and hence it cannot be disturbed.

We find that the instructions upon which the case was submitted to the jury stated the law correctly and embraced all of the issues presented by the pleadings and the evidence, and hence no prejudicial error was committed in the instructions given to the jury.

The court properly refused to direct a verdict and to grant a new trial.

By the Court.—Judgment affirmed.

BARNES, J. (*dissenting*). It is impossible to tell upon what evidence the jury relied in finding that the surety was not liable on the note of June 16th. The jury was not instructed that a renewal of the two notes first given, after a revocation of the guaranty, and without the consent of the surety, would discharge the latter, and that if revocation were found as a matter of fact a verdict should be returned for the defendant, and we have no means of knowing what the result of such an instruction would have been. Indulging in the presumption most favorable to support the judgment, it is that the jury found that some time before the last note was given the defendant advised the plaintiff to make no further loans on the strength of the guaranty. It seems to me that after this notice was given the guaranty ceased to be a continuing one. As to all loans made before the notice was given defendant might be liable. But I think the creditor had no right to extend the time of payment of the debt and renew the notes which evidenced it without the consent of the surety after the guaranty had been repudiated. It is needless to cite authority to the proposition that the liability of a surety is *strictissimi juris,* or that an extension of the time of the payment of an obligation without the assent of the surety ordinarily operates to discharge him.

I think the judgment should be reversed on another ground. The defendant requested the court to charge the jury in reference to the two notes first given, as follows:

"I also charge you that any extension of time of the other two notes after the bank was notified that defendant would not be bound by reason of said guaranty, if you find that they were extended without the knowledge or consent of said de-

fendant, such renewals on the part of the bank were unwarranted and the defendant is discharged from any liability thereon."

There was sufficient evidence to support a finding of the jury to the effect that the plaintiff was advised by the defendant that he repudiated and refused to be bound by the guaranty. There being such evidence, the instruction asked was correct as a proposition of law and material as a matter of fact. Such an instruction might well have had a controlling weight with the jury. I think it reasonably appears from the record that exception was taken to the refusal of the court to give the charge above quoted, and that the exception is properly before this court for consideration.

HALFHILL, Respondent, vs. MALICK, Appellant.

February 2—February 21, 1911.

Judgment by confession: Warrant of attorney: Common-law rule: Execution of power: Presumptions: Irregularities: Collateral attack: Verification of complaint by attorney: Judgment roll: Bills and notes: Judgment for indorsee: Real party in interest: Venue: Where defendant is "found:" Foreign judgment: Excessiveness: Signature of judge: Authentication.

1. The power to confess judgment by warrant of attorney comes from the common law and is governed thereby except as that has been modified by statute and the decisions of the courts of last resort in this country.
2. The strict rule of the common law that a judgment could not be confessed on a warrant of attorney after a year and a day, unless an affidavit was filed showing that the maker was alive and that some portion of the debt was still due, does not apply where the power is coupled with an interest and supported by consideration, and necessary to effectuate the security to which it attaches.
3. The rule does not go to the question of power, but to the regularity of execution of the power. It is a rule of presumption which, like other presumptions, may be rebutted, and the rec-

ord of the judgment is ample to rebut the presumption of payment, if any there be, arising from the lapse of time.

4. In the absence of equities in favor of the debtor, a judgment by confession on warrant of attorney will not be set aside for mere irregularities.
5. Mere irregularities under a warrant of attorney with release of errors will not generally subject a judgment to collateral attack.
6. Under the statute of Ohio a complaint or petition founded upon a promissory note may be verified by plaintiff's attorney where such instrument is in the hands of the attorney, and judgment thereon, entered on warrant of attorney, will be valid.
7. The provisions of sec. 2896, Stats. (1898), that the warrant of attorney under which judgment is confessed shall be made a part of the judgment roll, and that the affidavit therein required shall be attached to the complaint, do not apply to a judgment confessed in Ohio where the statute does not call for an affidavit and only requires that the original or a copy of the warrant shall be filed with the clerk.
8. A power of attorney to confess judgment on a promissory note in favor of the payee or assigns, authorizes confession of judgment in favor of an indorsee.
9. The question whether a person in whose favor a judgment has been confessed on a warrant of attorney is the real party in interest cannot be raised on collateral attack on the judgment.
10. A nonresident defendant who appears by attorney and confesses judgment under a warrant of attorney is "found" in the county where such judgment is entered, within the meaning of a statute (of Ohio) which provides that actions may be brought in the county where the defendant is found.
11. The fact that a foreign judgment was for seventy-four cents too much is immaterial in an action thereon, under the maxim *de minimis non curat lex.*
12. A foreign judgment which, under the law of the state where it was rendered, is admissible in evidence and valid without being signed by the judge or clerk of the court, is entitled to full credit here, although unsigned.
13. The record of the judgment of a court of another state is admissible in evidence here if attested and certified either in accordance with the federal statute or with the statute of this state. *In re Box's Will*, 127 Wis. 264, so far as it conflicts herewith, overruled.

APPEAL from a judgment of the circuit court for Portage county: CHAS. M. WEBB, Circuit Judge. *Affirmed.*

The plaintiff, a resident of Ohio, brought this action in the circuit court for Portage county upon the following judgment:

"Pleas before the court of common pleas within and for the First subdivision of the Third judicial district of the state of Ohio, at a court begun and held at the courthouse in Lima, Allen county, Ohio, on the 24th day of September, 1906.

"*Maggie Malick Halfhill,* Plaintiff,
No. 12889 vs.
"*John P. Malick,* Defendant. } *Cognovit.*

"Be it remembered that heretofore, to wit, on the 19th day of January, A. D. 1907, there was filed in the office of the clerk of said court a petition which reads and is in the words and figures following, to wit:

"The State of Ohio, Allen County, ss.: In the Court of Common Pleas. (Case No. ——.) *Maggie Malick Halfhill,* Plaintiff, vs. *John P. Malick,* Defendant.

"PETITION. *First cause of action:* Now comes the plaintiff, *Maggie Malick Halfhill,* and for her first cause of action against the defendant, *John P. Malick,* says: That on or about the 7th day of April, 1877, the defendant executed and delivered to James Malick his promissory note of that date, together with a warrant of attorney, a copy of which promissory note and warrant of attorney together with all the indorsements thereon are as follows, to wit: $555.66. Van Wert, O., April 7, 1877. Thirty days after date I promise to pay to the order of James Malick, five hundred and fifty-five and 66-100 dollars at Van Wert, Ohio, for value received, with eight per cent. interest from date. And we hereby authorize and empower any attorney at law, at any time after this obligation becomes due, to appear for us before any court of record, or before any justice of the peace, in the state of Ohio, or elsewhere, and waive the issuing and service of process and confess judgment against us, in favor of the payee above named, or assigns, for the sum due hereon, interest and costs, and thereupon to release all errors and waive all right and benefit of a second trial or appeal in our behalf. [Signed] *John P. Malick.* [Seal.] The follow-

ing indorsements appear on the back of said note, to wit: 'Van Wert, Apr. 4, 1878. Rec. on the within forty-five dollars. St. Mary's, Jan. 18, ——. Received on the within fifty dollars. Oct. 16, '82. Received on the within twenty-five dollars. Oct. the 18th, 1897, received on the within five dollars. Rec'd on the within $15 on Jan. 11, 1899. Received on the within note $5. August the 24, 1905. Pay to the order of *Maggie Malick Halfhill.* James Malick.' The plaintiff further says that James Malick, the payee named in said note, transferred and assigned all of his rights and interest in said note and the power of attorney annexed thereto to the plaintiff, *Maggie Malick Halfhill,* for a valuable consideration; that the plaintiff is the legal owner and holder thereof; that said note is due and unpaid except as shown by the credits indorsed on said note; and that there is due plaintiff thereon from said defendant the sum of five hundred fifty-four and 85-100 dollars ($554.85) with interest thereon at the rate of eight per cent. (8 per cent.) per annum from April 4th, 1878, less the sum of fifty dollars ($50) paid on Jan. 8th, 18—: the sum of twenty-five ($25) dollars paid on October 16th, 1882; the sum of five dollars ($5) paid on October 18th, 1897; the sum of fifteen dollars ($15) paid on January 11th, 1899; and the sum of five dollars paid on August 24th, 1905, which amounts to the sum of seventeen hundred and thirty-three and 59-100 dollars ($1,733.59) this 19th day of January, A. D. 1907.

"*Second cause of action.* Now comes the plaintiff, *Maggie Malick Halfhill,* and for her second cause of action against the defendant, *John P. Malick,* says: that on or about the 13th day of February, 1878, the defendant executed and delivered to James Malick his promissory note of that date together with warrant of attorney, a copy of which promissory note and warrant of attorney together with all the indorsements thereon are as follows, to wit: '$167.17. Van Wert, O., February 13, 1878. One day after date I promise to pay to the order of James Malick, one hundred and sixty-seven and 18-100 dollars, with eight per cent. interest after due. And we hereby authorize and empower any attorney at law, at any time after this obligation becomes due, to appear for us before any court of record, or before any justice of the peace, in the state of Ohio, or elsewhere, and waive

the issuing and service of process and confess judgment against us and in favor of the payee above named or assigns, for the sum due thereon, interest and costs, and thereupon to release all error and waive all right and benefit of a second trial in our behalf. [Signed] *J. P. Malick.* [Seal.]' The following indorsements appear on the back of said note, to wit: 'Van Wert, O., Oct. 9, '79. Rec. on the within fifty dollars. June 22nd '81. Rec'd on within Board $30 thirty dollars. Oct. the 16, '82. Received on the within fifty dollars. Rec'd on the within note $15 Jan. 11, 1899. Received on the within note $5, August the 24, 1905. Pay to the order of *Maggie Malick Halfhill.* James Malick.' The plaintiff further says that *J. P. Malick,* the person who signed the above described note, is *John P. Malick,* the defendant in the above entitled cause. That said promissory note is due and unpaid, except as shown by the credits indorsed on said note. That James Malick, the payee named in said note, assigned and transferred all of his right and interest in said note and the power of attorney annexed thereto to the plaintiff, *Maggie Malick Halfhill,* for a valuable consideration. That the plaintiff is the legal owner and holder thereof, and that there is due her thereon from said defendant the sum of ninety-one and 81-100 dollars ($91.81), with interest at the rate of eight per cent. (8 per cent.) per annum thereon from October 16th, 1882, less the sum of fifteen dollars ($15) which was paid on said note Jan. 11, 1899, and the sum of $5 five dollars which was paid on said note on the 24th day of August, 1905, which amounts to the sum of two hundred and forty-nine and 94-100 dollars ($249.94) this 19th day of January, A. D. 1907.

"Wherefore said plaintiff asks judgment on her first cause of action herein against said defendant, for the sum of five hundred fifty-four and 85-100 ($554.85) dollars, with interest thereon at the rate of eight (8) per cent. per annum from April 4th, 1878, less the sum of one hundred dollars ($100) which sum was paid as above alleged, which amounts to the sum of seventeen hundred and thirty-three and 59-100 ($1,733.59) this 19th day of January, A. D. 1907; and a judgment on her second cause of action herein against said defendant for the sum of ninety-one and 81-100 dollars ($91.81) with interest thereon at the rate of eight per cent.

(8 per cent.) per annum from October 16th, 1882, less the sum of twenty ($20) dollars which sum was paid as above alleged, and which amounts to the sum of two hundred and forty-nine and 94-100 dollars ($249.94) this 19th day of January, A. D. 1907; and for the costs of this suit. *Maggie Malick Halfhill.* By Ridenour and Halfhill, Her Attorneys.

"The State of Ohio, Allen County, ss.: Before me, the undersigned authority, personally appeared James W. Halfhill, who, being first duly sworn according to law, says: That he is one of the attorneys of record for said plaintiff; that this action is brought upon an instrument in writing for the payment of money only; that said instrument in writing is in his possession and that he verily believes the statements contained in the foregoing petition are true in substance and in fact. James W. Halfhill. Sworn to before me by the said James W. Halfhill, and by him in my presence subscribed this 19th day of January, A. D. 1907. O. O. Barr, Notary Public, Allen County, Ohio. [Seal.]

"And afterwards, to wit, on the 19th day of January, A. D. 1907, the following answer was filed, to wit:

"The State of Ohio, Allen County, ss.: In the Court of Common Pleas. *Maggie Malick Halfhill,* Plaintiff, vs. *John P. Malick,* Defendant.

"ANSWER. By virtue of the warrants of attorney, copies of which are set forth in the first and second causes of action in the petition, I, O. O. Barr, an attorney at law in the several courts of record in the state of Ohio, hereby enter an appearance for the said defendant at the suit of *Maggie Malick Halfhill,* plaintiff, against the said *John P. Malick,* defendant, and waive the issuing and service of process herein, and confess a judgment on the first cause of action in favor of the said plaintiff, *Maggie Malick Halfhill,* against the said defendant, *John P. Malick,* for the sum of seventeen hundred and thirty-three and 59-100 dollars ($1,733.59) damages, being the amount appearing due for principal and interest this 19th day of January, A. D. 1907, and a judgment on the second cause of action in favor of the said plaintiff and against the said defendant for the sum of two hundred and forty-nine and 94-100 dollars ($249.94) damages, being the amount appearing due for principal and interest this 19th

day of January, A. D. 1907, and also $—— for costs of suit. And I do hereby release all error and waive all right of appeal. *John P. Malick,* By O. O. Barr, His Attorney.

"And afterwards, to wit, on the 19th day of January, A. D. 1907, the following proceedings were had in the common pleas court, to wit:

"The State of Ohio, Allen County, ss.: In the Court of Common Pleas. *Maggie Malick Halfhill,* Plaintiff, vs. *John P. Malick,* Defendant.

JOURNAL ENTRY. Now, this 19th day of January, A. D. 1907, came the plaintiff, *Maggie Malick Halfhill,* by her attorneys; also came O. O. Barr, one of the attorneys of this court, on behalf of the defendant, *John P. Malick,* and by virtue of the warrants of attorney for that purpose duly executed by the said *John P. Malick* and now produced to the court waived the issuing and service of process, and with the assent of the plaintiff, *Maggie Malick Halfhill,* confesses that the said *John P. Malick* is justly indebted to said plaintiff, to even date herewith in the sum of seventeen hundred and thirty-three and 59-100 dollars ($1,733.59) on the first cause of action alleged in the petition, and the sum of two hundred and forty-nine and 94-100 dollars ($249.94) on the second cause of action alleged in the petition. And the court finds from the evidence adduced that the defendant is indebted in said sums of seventeen hundred and thirty-three and 59-100 dollars ($1,733.59) on the first cause of action alleged in the petition, and two hundred and forty-nine and 94-100 dollars ($249.94) on the second cause of action alleged in the petition. The court further finds that James Malick, the payee, assigned all of his rights and interest in the notes and powers of attorney, set forth in the first and second causes of action, to the plaintiff, *Maggie Malick Halfhill,* for a valuable consideration; and that she is the legal owner and holder of said notes. It is therefore considered by the court that the said *Maggie Malick Halfhill* recover from the said *John P. Malick* the said sums of seventeen hundred and thirty-three and 59-100 dollars ($1,733.59) and two hundred and forty-nine and 94-100 ($249.94), amounting to the sum of nineteen hundred and eighty-three and 53-100 ($1,983.53) dollars, with interest thereon at the rate of eight per cent. (8 per cent.) per annum from January

19th, 1907, together with her costs herein expended taxed at $5."

The defendant answered putting in issue the material allegations of the complaint; charges fraud; pleads payment of the notes upon which said judgment purports to have been entered; the various statutes of limitation of Ohio and Wisconsin in bar; that the indebtedness represented by the smaller of the two notes was in fact included in the other, and that it was executed by mistake; alleges that plaintiff is not the real party in interest, had no interest in the notes, and if transferred to her in fact such transfer was without consideration, and that she had no right or lawful authority to enter judgment thereon; alleges that no person or persons had any authority from defendant to enter an appearance and confess judgment against him on account of said notes or either of them, and if any person did so appear it was without authority; that said Ohio court was without jurisdiction to enter judgment upon said notes or either of them; alleges that any indorsements upon said notes subsequent to October 16, 1882, were without authority or consent of defendant, and that if such were made it was with fraudulent intent and purpose; that no process was ever served on defendant, either personally or constructively, and that he had no opportunity to appear or defend or be heard in the matter resulting in said alleged Ohio judgment, and that the same was taken without his consent or knowledge; and prays dismissal of the action and that plaintiff be perpetually enjoined and restrained from enforcing said judgment.

The court below found the facts in favor of the plaintiff, and as conclusions of law that the Ohio judgment was regular and valid, that plaintiff was the owner of the notes, the amount due, and that the notes were valid existing obligations when the judgment was entered; and ordered judgment for plaintiff for $2,467.80. Judgment was entered for plaintiff accordingly, from which this appeal was taken.

For the appellant there was a brief by *Owen & Hanna,* attorneys, and *B. R. Goggins,* of counsel, and oral argument by *Mr. Goggins* and *Mr. W. F. Owen.*

Byron B. Park, for the respondent.

KERWIN, J. The learned counsel for the appellant, both in their brief and upon oral argument, attack the Ohio judgment and the judgment of the court below and insist that the judgment appealed from should be reversed. They have favored us with very exhaustive and able argument to sustain their position, and the propositions in support of their several contentions have been examined with care, but we have been unable upon the whole record to bring ourselves to the conclusion that the judgment below should be reversed.

The first and principal point made by appellant is that the Ohio judgment was not admissible in evidence. We have set out in the statement of facts the record resulting in the judgment of the Ohio court which is attacked. It is said that the power to confess judgment by warrant of attorney comes from the common law, and this is true except in so far as the old rule of the common law has been modified by statute and the decisions of the courts of last resort in this country. The statutes of Ohio were put in evidence on the trial in the court below, and we find therein some provisions respecting judgments by warrant of attorney. Secs. 5324, 5035, 5325, 5354, and 6355, Bates' Ann. Ohio Stats. (5th ed.). Counsel for appellant cite the rule of the common law from Tidd's Practice to the effect that a judgment could not be confessed upon a warrant of attorney executed more than a year and a day before, unless an affidavit was filed showing that the maker was alive and that some portion of the debt was still due, and a stricter rule applied where the warrant was ten or twenty years old, and it is argued that some such showing was necessary to warrant the execution of the power of attorney in the instant case.

Whatever the rule of the common law was respecting the life of a naked power of attorney, we are convinced that such a strict rule as is laid down in Tidd's Practice, referred to by appellant's counsel, does not apply where the power is coupled with an interest and supported by consideration, and necessary to effectuate the security to which it attaches. *Hunt v. Rousmanier's Adm'rs,* 8 Wheat. 174; *Walsh v. Whitcomb,* 2 Esp. 565; 2 Kent, Comm. (1st ed.) 505–507; *Evans v. Fearne,* 16 Ala. 689; *Hutchins v. Hebbard,* 34 N. Y. 24; *Wassell v. Reardon,* 11 Ark. 705, 54 Am. Dec. 245.

Moreover, the rule referred to does not go to the question of power but to the regularity of the execution of it. It is a rule of presumption, which like other presumptions may be rebutted. The record of the judgment is ample to rebut the presumption of payment, if any arose by lapse of time, and there is no pretense that the defendant was dead at the time of entry of the judgment. The cases cited by appellant on the question under consideration generally go to the question of the regularity of the exercise of the power under the warrant. *Bryant v. Harding,* 29 Mo. 347; *Clark's Ex'rs v. Hopkins,* 7 Johns. 555; *Wight v. Alden,* 3 How. Pr. 213; *Manufacturers' & M. Bank v. St. John,* 5 Hill (N. Y.) 497. In *Alldritt v. First Nat. Bank,* 22 Ill. App. 24, it was held that a judgment entered by confession upon a power of attorney which was more than a year and a day old would not be set aside for want of an affidavit showing that the defendant was alive and some part of the debt unpaid, unless some equitable grounds of relief were shown, citing *Rising v. Brainard,* 36 Ill. 79, and *Stuhl v. Shipp,* 44 Ill. 133. The rule has been held in this state, in cases of judgment by confession, that in the absence of equities in favor of the debtor a judgment will not be set aside for irregularities. *Reiley v. Johnston,* 22 Wis. 279; *F. Mayer B. & S. Co. v. Falk,* 89 Wis. 216, 61 N. W. 562.

The Ohio statutes (2 Bates' Ann. Stats. secs. 5324 and

5325) provide for judgment by warrant of attorney, and require the attorney at the time of making the confession to produce the warrant to the court, and that the original or a copy shall be filed with the clerk of the court. It is argued that the verification of the complaint is not sufficient because made by the attorney, and that it must be made by the party. We think the verification sufficient and in compliance with the Ohio statute (vol. 2, sec. 5109), which provides (subd. 3) that when the pleading to be verified is founded upon a written instrument for the payment of money and such instrument is in the possession of the agent or attorney the verification may be made by the agent or attorney. Appellant places some reliance upon sec. 2896 of our statutes respecting the entry of judgments upon warrant of attorney, but it will be seen that this section is different from the Ohio statute upon the same subject. For example, one point of difference is that under the Wisconsin statute the original warrant must be produced and made a part of the judgment, while the Ohio statute requires that the original or a copy of the warrant shall be filed with the clerk. 2 Bates' Ann. Ohio Stats. sec. 5324. The Wisconsin statute is in other respects different from the Ohio statute.

In the instant case the petition alleges the execution of the notes and warrants and sets out copies in the petition; also sets out and alleges due assignment to plaintiff and indorsements on the notes. The plaintiff was, under the strict power, the assignee of the notes, and the Ohio court, a court of general jurisdiction, so found. It is true, as argued, that the attorney in confessing judgment must keep strictly within the power conferred, but it must also be remembered that the power of attorney in this case contains a release of errors; besides, the record shows that the power was strictly followed. It must also be borne in mind that mere irregularities under a warrant with release of errors will not generally subject a judgment to collateral attack. Van Fleet, Collateral Attack,

p. 2; *Knox Co. Bank v. Doty,* 9 Ohio St. 505; *Callen v. Ellison,* 13 Ohio St. 446.

It is argued that the warrant of attorney does not authorize judgment in favor of plaintiff because plaintiff is not an assignee within the record. The record shows absolute indorsement to plaintiff, and besides the court finds that the notes were duly assigned to plaintiff. But it is said the court could not find facts not warranted from the power. This may be conceded, but the power authorizes judgment in favor of the payee "or assigns," and the plaintiff was an assignee under the strict terms of the power as well as under the proof and finding. It is further argued under this head that the proof showed that plaintiff was not the real party in interest and therefore was not entitled to judgment. We think this contention is not supported by the evidence or the law. But even if it could be said that the plaintiff under the evidence was not the real party in interest, still the question cannot be raised upon collateral attack. Freeman, Judgments, § 557; *Lantz v. Maffett,* 102 Ind. 23, 26 N. E. 195. *Nat. Exch. Bank v. Wiley,* 195 U. S. 257, 25 Sup. Ct. 70, is strongly relied upon by counsel for appellant, but in that case the power of attorney authorized the confession of judgment in favor of the "holder" of the note, and there was no indorsement on it showing that it had ever been assigned or transferred by the original payee. The note was payable to the National Exchange Bank or order, with warrant of attorney attached. It was held that the power, being to confess judgment in favor of the "holder," did not, in the absence of express terms, authorize the confession of judgment in favor of the original payee after it ceased to be the owner of the note. So it will be seen that the case is not controlling here. That the power of attorney authorized the entry of judgment in favor of the plaintiff in the instant case is fully warranted by the Ohio decisions. *Spence v. Emerine,* 46 Ohio St. 433, 440, 21 N. E. 866; *Cushman v. Welsh,* 19 Ohio St. 536;

Watson v. Paine, 25 Ohio St. 340; *Clements v. Hull,* 35 Ohio St. 141.

It is further urged that the Ohio court had no jurisdiction of the action because brought in the wrong county; that the action must be brought in the county where there is property or debts owing to the nonresident, or where the defendant is found, or where the cause of action arose, and that none of these conditions attached to the county of the Ohio judgment. We think, however, that the Ohio statute meets the objection raised. Sec. 5027, 2 Bates' Ann. Ohio Stats., provides that the action may be brought where the defendant is found. The defendant though a nonresident had a right to appear by attorney, and it clearly appears from the record that defendant did appear by attorney "by virtue of warrants of attorney for that purpose duly executed by the said *John P. Malick* and now produced to the court."

That the judgment was seventy-four cents too large. If it was, it is ruled by the maxim *de minimis non curat lex.*

It is further contended that the record does not show any judgment in fact, or that any judgment was ever entered, because the record offered and received in evidence does not show that it was signed by the judge or clerk of the court and there is nothing to show that it was ever entered in or constituted a part of any judgment book. And it is said, quoting from our statute (sec. 2896, Stats. 1898), that "the judgment shall be signed by the court or a judge and shall be thereupon entered and docketed by the clerk and enforced in the same manner as judgments in other cases." But the entry of judgments in Ohio is controlled by the Ohio statutes and not by the Wisconsin statutes. The Ohio statutes respecting the subject are secs. 5310, 1245, 5331, 4962, 4957, 5332, 5333, and 5334, Bates' Ann. Ohio Stats. (5th ed.). These statutes show that the record was admissible in evidence though not signed by the judge or clerk of the court. Sec. 1245 provides that the clerk shall enter all judgments,

and sec. 5331 provides that they shall be entered on the journal of the court and specify the relief granted; sec. 4962 provides that the clerk shall keep the journal; sec. 4957 provides that the books shall be kept by the clerk; sec. 5333 provides that the clerk shall make up the record in each cause in the vacation next after the term at which the same was determined, and the presiding judge of the court shall at the next term thereafter subscribe the same. The original papers and transcripts from the journal entries are admissible in evidence as the record when they have not been carried into the record book, under the Ohio decisions cited in the statute. *Morgan v. Burnett,* 18 Ohio, 535. And the signature of the presiding judge is not essential to the validity of the record. *Osburn v. State,* 7 Ohio (Part I) 212. The record of the Ohio judgment admitted in evidence was duly attested by the clerk and the seal of the court annexed, together with a certificate of the judge as required by sec. 905, 1 U. S. Comp. Stats. 1901, and was therefore admissible in evidence. *Ordway v. Conroe,* 4 Wis. 45; *Hackett v. Bonnell,* 16 Wis. 471. The foregoing authorities show that the record might be attested and certified either in accordance with the federal statutes above referred to or according to the state statutes. In this connection we call attention to the case of *In re Box's Will,* 127 Wis. 264, 106 N. W. 1063, in which it was held that an Illinois record was not admissible in evidence because not certified in the manner provided by the statutes of this state, although it would seem from the statement of facts that the record was authenticated in accordance with the federal statute heretofore cited. Anything said in the case last named in conflict with the rule laid down as to authentication of records from other states in *Ordway v. Conroe* and *Hackett v. Bonnell, supra,* must be regarded overruled.

Other questions discussed by appellant respecting the statutes of limitation barring the notes, invalidity of the $167.18

note, and substantial excessiveness of the judgment aside from the seventy-four cents before referred to, were found by the court below, upon sufficient evidence, in favor of plaintiff, and the findings upon these questions cannot be disturbed even if open to investigation at all. How far the matters determined and adjudicated by the Ohio judgment could be questioned and re-litigated in the court below we need not discuss. It may well be that such matters could not be re-examined in the suit upon the judgment, the judgment being good upon its face and no fraud having been shown in the procuring of it. But the court below tried all questions raised against the validity of the judgment as well as against the justice of it, and all issues were resolved against the defendant, and we find no error in the record of which he can complain.

By the Court.—The judgment below is affirmed.

COLT, Respondent, vs. PAULSON, Appellant.

February 2—February 21, 1911.

Deeds: Construction: Extrinsic evidence: Water power: Injunction: Judgment: Determination of matters not in issue.

1. To aid in the interpretation of a deed granting certain rights relative to a mill-dam, pond, and the use of power, oral evidence of extrinsic facts and circumstances existing at the date of the grant, including the location, size, and description of the dam, mills, waste-gates, etc., was admissible.
2. In an action for an injunction compelling removal of a cofferdam built by defendant in a mill-pond and restoration of a waste-gate closed by him, and restraining the doing of such acts in the future, it was not error, upon granting such relief, to refuse to find and adjudge defendant's rights in other particulars with respect to the water power, when such adjudication was not necessary.

APPEAL from a judgment of the circuit court for Waushara county: CHAS. M. WEBB, Circuit Judge. *Affirmed.*

For the appellant the cause was submitted on the brief of *Phillips & Hicks.*

For the respondent there was a brief by *George B. Heaney* and *Perry Niskern,* and oral argument by *Mr. Niskern.*

TIMLIN, J. In 1893 the plaintiff's ancestor executed to defendant a warranty deed of certain riparian land. The deed contained the following:

"Does also include in this sale the right also to have the use of water from the mill-pond sufficient to run a forty-inch turbine water wheel, said wheel and the flume leading thereto being kept in good order by the party of the second part and the head or surface in said pond being controlled by the party of the first part, who agrees to keep the head of water at or as near as possible the ordinary stage kept to run the flour mill, except that either party shall have the right to draw down the pond to make repairs by giving three days' notice, and said repairs to be finished without needless delay."

Plaintiff brought this suit for an injunction to compel defendant to remove a cofferdam he had placed in the mill-pond, to restore a waste-gate he had closed in the dam at a specified place, to remove a building he had so constructed as to interfere with plaintiff's opening of a waste-gate in the dam, and to restrain the doing of such acts in the future, and for other relief. The dam is across Pine river at the head of an island, and the plaintiff has a grist-mill at the south end of the dam, the defendant a sawmill at the north end thereof, both mills drawing for power on the pond formed by this dam, and both parties to the action acting under the instrument above mentioned and the former title of plaintiff's predecessor in interest. The circuit court granted the relief sought with reference to the building which obstructed the opening of the waste-gate and the removal of the cofferdam and the restoration of the closed waste-gate or waste-way, and

enjoined the defendant from thereafter building or maintaining any dams or obstructions in the mill-pond or placing or maintaining any material therein except when immediately necessary to enable the defendant to make necessary repairs on his sawmill or the flume thereof, etc.

Error is assigned (1) because the court held the building by defendant of the cofferdam was unlawful; (2) because the court did not find the defendant owned the flume which he is required to maintain; (3) because the court admitted written evidence of plaintiff's title and also extrinsic oral evidence of facts and circumstances to aid in the construction of the instrument from which the foregoing excerpt is quoted.

The instrument in question does not grant to the defendant any right in the mill-pond or dam other than the use of the quantity of water mentioned with the privilege and duty of repairing or rebuilding his water wheel and flume and the right to draw down the pond for the purpose of making such repairs without needless delay. He has no doubt a proprietary interest in the flume constructed or repaired by him, but not the exclusive ownership thereof as against the plaintiff. It was very proper to show what contiguous property the grantor of defendant and ancestor of plaintiff had title to, including the dam and pond, when he made the conveyance in question, for the purpose of establishing that all which he did not grant away to defendant by the instrument in question remained his property and became the property of plaintiff. So, also, that at the time of the grant in question there was a mill-pond, a dam at the head of an island with a gristmill at the south end of the dam and a sawmill at the north end of it, the location, size, and description of the flume, the height of the dam, and the location and size of waste-gates as they then were, and such like extrinsic facts and circumstances, were proper to be shown by parol evidence for the purpose of aiding in the interpretation of the written instrument. *Klueter v. Schlitz B. Co.* 143 Wis. 347, 128 N. W.

43; *Burton v. Douglass,* 141 Wis. 110, 123 N. W. 631; *Lyman v. Babcock,* 40 Wis. 503; *Nilson v. Morse,* 52 Wis. 240, 9 N. W. 1; *Ganson v. Madigan,* 15 Wis. 144; *Prentiss v. Brewer,* 17 Wis. 635; *Sawyer v. Dodge Co. Mut. Ins. Co.* 37 Wis. 503; *Sigerson v. Cushing,* 14 Wis. 527; 4 Wigmore, Ev. § 2470; *Nash v. Towne,* 5 Wall. 689; *Merriam v. U. S.* 107 U. S. 437, 2 Sup. Ct. 536.

It is suggested that the court erred in refusing to find and adjudge that the defendant's right to use sufficient water to run a forty-inch turbine wheel and his obligation to maintain the flume and wheel is equivalent to ownership and not subordinate to the rights of the plaintiff. It was not necessary to so find. There is nothing adjudged against the defendant here or any of his rights except in the particulars in which the defendant is required to undo his former acts and refrain from like acts in the future, and as to these particulars the judgment appears to be right and should be affirmed.

By the Court.—Judgment affirmed.

WELLER, Respondent, vs. HEIMBRUCK, Appellant.

February 2—February 21, 1911.

Easements: Obstruction of private way: Damages.

Where, by the wrongful obstruction of a lane through which he had a right to travel, one has been deprived of access to his farm land which he was using himself, his right to recover is not limited to the difference between the rental value of the land with the lane open and its rental value with the lane closed, but he is entitled to fair and reasonable compensation for his actual loss proximately caused by the wrongful act, including loss of the use of the land and loss of crops and pasturage.

APPEAL from a judgment of the circuit court for Waupaca county: CHAS. M. WEBB, Circuit Judge. *Affirmed.*

The plaintiff was the owner of sixty acres of land which was segregated from the remainder of his farm and was not accessible from any highway. By deed of conveyance he secured a right to travel over a space of one rod on the east side of the northwest quarter of the southwest quarter of section 25, township 23 north, of range 13 east. Through such alley plaintiff was enabled to reach the sixty-acre tract referred to. This tract was used mostly for pasture, a portion of it being suitable for potatoes. On June 18, 1907, the defendant, who owned the aforesaid northwest quarter of the southwest quarter of section 25 subject to said easement, nailed up the gate at the entrance of the lane and forcibly prevented plaintiff from driving his stock through the same and forbade the plaintiff any further use thereof. On September 21, 1907, plaintiff commenced an action to recover damages sustained by him by reason of the closing up of the lane, and obtained a judgment in such action. The present action was brought to recover damages sustained by the plaintiff by reason of the closing of said lane after September 21, 1907, and resulted in a verdict and judgment for the plaintiff for $145 damages. This appeal is taken from such judgment.

For the appellant the cause was submitted on the brief of *R. N. Van Doren.*

For the respondent there was a brief by *E. L.* and *E. E. Browne,* and oral argument by *W. E. Fisher.*

BARNES, J. Errors are assigned on the charge of the court and on rulings on the admission of testimony. The court charged the jury, among other things, that the evidence conclusively established the fact that the defendant wrongfully and unlawfully denied plaintiff's right to use the alley or lane referred to in the statement of facts and also prevented him from using the same. The defendant contends that the evidence presented a question of fact on this point which

should have been submitted to the jury for determination. We think the court was clearly right in instructing the jury as it did, and that there was no evidence from which the jury might have found that the defendant did not obstruct the alley or did not prevent the plaintiff from using the same during the period of time covered by the complaint.

The court further instructed the jury that the plaintiff was entitled to recover such damages for the "loss of use of said land, and loss of crops and pasturage, as you shall from the whole evidence believe he suffered by reason of having been during said time by the defendant so denied and deprived of his right to pass to and from his said land, and by reason of his inability, because thereof, to go upon, cultivate, crop, use, and pasture said land."

Evidence was introduced by the plaintiff, and received under objection, tending to show the amount of damage which he sustained by reason of being deprived of the use of his land. It is contended that the court did not correctly state the rule of damages applicable to the case and also that it erred in admitting evidence tending to establish such damages. If the correct rule was given, then no material error was committed in receiving the evidence to which exception was taken. So the only question which it is necessary for this court to consider is whether the portion of the charge quoted is erroneous.

The plaintiff was wrongfully deprived of the use of his land. His actual loss was the value of the use which had been taken from him. He was entitled to such damages as naturally and proximately resulted from the act complained of and such as would fairly and reasonably compensate him for the wrong which he suffered. *Tuttle v. Walker,* 46 Me. 280; *Rogers v. Stewart,* 5 Vt. 215; *Bannon v. Romeiser,* 17 Ky. Law Rep. 1378, 34 S. W. 1084; *Allison v. Chandler,* 11 Mich. 543; *Gilson v. Fischer,* 68 Iowa, 29, 25 N. W. 914; *Freeman v. Sayre,* 48 N. J. Law, 37, 2 Atl. 650; *Broussard*

v. S. & E. T. R. Co. 80 Tex. 329, 16 S. W. 30; *Hayden v. Albee,* 20 Minn. 159; *Emery v. Lowell,* 109 Mass. 197; *Mayor, etc. v. Small,* 108 Ga. 309, 323, 34 S. E. 152; *Anderson v. C., M. & St. P. R. Co.* 85 Minn. 337, 88 N. W. 1001; *Berger v. Minneapolis G. Co.* 60 Minn. 296, 62 N. W. 336; *Larson v. Lammers,* 81 Minn. 239, 83 N. W. 981; *Scanland v. Musgrove,* 91 Ill. App. 184; *Louisville, N. A. & C. R. Co. v. Malott,* 135 Ind. 113, 34 N. E. 709.

The appellant contends that plaintiff's recovery should be the difference between the rental value of the premises with the lane open and their rental value with the lane closed, and a number of cases are cited in support of such rule. Some of these cases are not tort actions, but relate to breaches of covenants contained in leases. Such are *Kellogg v. Malick,* 125 Wis. 239, 103 N. W. 1116; *Hunter v. Hathaway,* 108 Wis. 620, 84 N. W. 996; and *Shaft v. Carey,* 115 Wis. 155, 83 N. W. 288. The case of *Carl v. S. & F. du L. R. Co.* 46 Wis. 625, 1 N. W. 295, was an action for trespass, and the court held that the value of the use of that part of the street occupied by the railway company was not the measure of the plaintiff's damages, for the very good reason that in that particular case such damages would not compensate him for the loss which he actually sustained. In the other Wisconsin cases cited, *Nelson v. Churchill,* 117 Wis. 10, 93 N. W. 799, and *Miller v. Neale,* 137 Wis. 426, 119 N. W. 94, damages were allowed commensurate with the loss actually suffered. If the plaintiff kept the premises for rent, the rule contended for by the appellant might well furnish adequate compensation. But he was using the premises himself, as he had the right to do, and should be paid what that use was reasonably worth to him. We find no prejudicial error in the record.

By the Court.—Judgment affirmed.

HIPPLER, Respondent, vs. QUANDT, Appellant.

February 2—February 21, 1911.

Malicious prosecution: Good faith: Advice of counsel: Evidence: Instructions to jury.

1. In an action for malicious prosecution the evidence is *held* to sustain a verdict to the effect that defendant did not make a full, fair, and impartial statement to the district attorney of all the facts within his knowledge relative to the offense charged, and act honestly and in good faith upon the advice of such attorney.
2. Refusal of the trial court to give requested instructions is not error when the general charge was full and complete and as favorable to the party making such request as the law permitted.

APPEAL from a judgment of the circuit court for Waupaca county: CHAS. M. WEBB, Circuit Judge. *Affirmed.*

Action for malicious prosecution of the plaintiff by the defendant on the criminal charge of embezzlement. The trial resulted in a verdict for the plaintiff, and from judgment thereon defendant appealed.

The cause was submitted for the appellant on the brief of *F. F. Wheeler* and *Wm. N. Martin,* and for the respondent on that of *Browne, Browne & Fisher.*

VINJE, J. As only two of the twelve assignments of error are argued in appellant's brief, they alone will be considered. It is claimed the evidence shows the defendant made a full, fair, and impartial statement to the district attorney of all the facts and circumstances known to him relative to the offense charged against plaintiff, and that upon the statement so made he was advised by the district attorney that plaintiff was guilty of the offense charged, and that he acted honestly and in good faith upon such advice. If this were so it would constitute a complete defense to the action, and the trial court so instructed the jury. There was, however, a conflict of evidence as to whether or not the defendant fairly stated

to the district attorney all the facts within his knowledge. The evidentiary facts relating to this issue are quite voluminous and it is deemed unnecessary to set them out in detail. Only a few of them will be briefly mentioned.

It seems undisputed that from April 1 to August 1, 1907, the defendant owned and conducted a hotel at Waupaca; that he hired plaintiff as clerk and manager with full power to collect and disburse money, hire and discharge help and pay the same, including himself; that on August 1st defendant sold his hotel, and upon a settlement with plaintiff it was found that the latter owed him about $50. Late in September defendant and his brother-in-law purchased the Fuller House at Rhinelander, and plaintiff was hired to work for the new firm and did so from about the 23d of that month until about the 4th of November following, at $40 per month. At that time he quit his employment and had then drawn $47 on account of wages, of which $15 was admitted to have been drawn with the consent of the defendant. He contended that his agreement with the plaintiff was that the latter should apply no moneys received on his wages without the express consent of himself or his wife until the sum of $50 was fully repaid. This plaintiff denied and claimed all the agreement he had with the defendant was that he should work for the firm on the same terms and under the same arrangement he had worked for the defendant at Waupaca; that there it was his custom, sanctioned by the defendant, to draw money from time to time and apply it on his wages, and that nothing was said about his not doing so until the $50 was repaid.

The defendant admits that he did not tell the district attorney anything about the way he had conducted the business with plaintiff at Waupaca. The district attorney testified that the defendant told him plaintiff had worked for him at Waupaca in the hotel business; that when he closed out plaintiff owed him a balance of $50, and he had consented to come to Rhinelander to work, and it was agreed between them that

plaintiff was to draw no money or anything from the business at Rhinelander, but was to turn in his wages in payment of the $50; that he had, nevertheless, in defendant's absence, drawn money and gone away; that upon this statement he advised the defendant that he thought plaintiff was guilty of embezzlement.

It will be seen from this summary of the testimony that the jury might well believe the agreement between plaintiff and defendant was that the former should work for the firm under the same conditions he had worked at Waupaca, which included permission to apply money on his own wages, and that the defendant had withheld such fact from the district attorney. The belief that defendant did not make a full, fair, and impartial statement to counsel and act honestly thereupon was no doubt strengthened by the fact that he admitted ulterior motives in making the arrest. He testified: "I wanted him to explain the books and pay me what he owed me or make arrangements to do so. I wanted to learn him a lesson not to get in that shape again and to get him to look the books over for me and pay me what he owed me or tell me when he would pay me."

The defendant excepted to the refusal of the court to give these instructions:

"You are not trying, in this case, the innocence or guilt of the plaintiff, as to whether he embezzled the sum of thirty-two dollars of the moneys of Quandt & Kelley, but whether the defendant in swearing out the warrant acted in good faith on evidence, whether true or false, which was sufficient to create in his mind a reasonable belief that the plaintiff was guilty of the offense, and if you so find, you should find for the defendant."

"The discharge of the plaintiff in the criminal action before Judge WALKER, as shown in this case, is not evidence of malice or want of probable cause."

The charge covers twelve printed pages and cannot be set out *in extenso*. It clearly pointed out, however, that the bur-

den rested upon the plaintiff to establish want of probable cause and malice, defined both correctly, instructed the jury as to the defense of advice of counsel, called their attention to the fact that many criminal prosecutions may be instituted in good faith and yet end in naught; that only the facts and circumstances known to the defendant at the time of the prosecution or those of which he had sufficient notice to put him upon inquiry were material; that the facts and circumstances afterwards discovered could have no bearing upon the question of want of probable cause; and that prosecutions were often, from the necessity of the case, properly instituted hastily and without opportunity to make full and complete investigation. Indeed, the charge was full and complete and as favorable to the defendant as the law permitted. He is in no position to allege error by reason of the refusal of the trial court to give the requested instructions.

By the Court.—Judgment affirmed.

F. A. PATRICK & Co. and another, Appellants, vs. DESCHAMP, Respondent.

February 3—February 21, 1911.

Foreign corporations: Right to do business: Interstate commerce: Sale of goods: Taking and enforcing security: Chattel mortgages: Sale: Filing affidavit: Application of proceeds: Trial: Directing verdict.

1. Sec. 1770*b*, Stats. (1898), which provides that no foreign corporation shall transact business or acquire or dispose of property in this state until it shall have filed with the secretary of state a certain certificate and verified statement and paid a prescribed fee, has no application to transactions of interstate commerce, the exclusive power to regulate which is vested in Congress.
2. If a foreign corporation sells goods and delivers them from its place of business outside of the state to a customer within the

state, the subsequent taking of a chattel mortgage on property within the state, to secure payment of the purchase price of such goods, and the sale on foreclosure of the mortgaged property, are incidents of the transaction and included in the scope of the term "interstate commerce."

3. Sec. 2316*a*, Stats. (1898), which prohibits a sale of property taken under a chattel mortgage before the expiration of five days from the time of taking, does not apply where the mortgagor consents to an earlier sale, such a case being expressly excepted.

4. The requirement of sec. 2316*c*, Stats. (Supp. 1906: Laws of 1903, ch. 122), that when property is taken and sold under a chattel mortgage the mortgagee shall within ten days after the sale file in the town clerk's office an affidavit giving the particulars of the sale, applies only where the property has been taken *in invitum* and not where the mortgagor consents to the taking.

5. In determining whether a verdict should be directed for one party the evidence of the other must be assumed to be true.

6. Under all ordinary circumstances debtor and creditor may by agreement control the application of payments between themselves.

7. A chattel mortgagee may, after taking the property, restore it to the possession of the mortgagor under an agreement that the proceeds of sales thereof shall first be applied upon an unsecured debt; and such arrangement is not invalid because the mortgagee is a foreign corporation and has not complied with sec. 1770*b*, Stats. (1898), if the agreement was made in a *bona fide* attempt to give on the one side, and receive on the other, security for the payment of an indebtedness resulting from interstate sales of goods.

8. One who actually bought and received merchandise is liable to pay for the same although at her request the account was kept and the goods invoiced in a different name in order to avoid trouble with a third person with whom she had agreed not to compete in business.

APPEAL from a judgment of the circuit court for Bayfield county: JOHN K. PARISH, Circuit Judge. *Reversed.*

The action is replevin for a stock of miscellaneous goods. The plaintiffs claim as mortgagees, the defendant as owner. Some facts were undisputed upon the trial. Among these were the following: The plaintiffs are two Minnesota merchandising corporations doing business at Duluth, Minne-

sota, neither of which had filed in the office of the secretary of state the certificate and verified statement required by sec. 1770*b*, Stats. (1898), at the time of the transactions involved in this action. Prior to July 21, 1908, the defendant, who conducts a general store at Iron River, Bayfield county, Wisconsin, had purchased large bills of goods from each of the plaintiff corporations, and was indebted to them in the aggregate to an amount considerably exceeding $3,000. On the day named she executed a demand note to each of them for $1,500, to apply on her indebtedness for goods purchased, and a chattel mortgage on her stock of goods for $3,000 to secure both notes. Plaintiffs claim that *Mrs. Deschamp* consented that they take immediate possession. She denies this. But in any event the fact is undisputed that they took immediate possession and placed a man in charge and sold goods from the stock to the gross amount of about $2,100 at private sale day by day until October 7th, when some difficulty took place between *Mrs. Deschamp* and the man in charge and the store was closed for a few days, and the plaintiffs were about to proceed to close out the stock at public sale. At this time *Mrs. Deschamp* went to Duluth and saw the plaintiffs and desired that the store be reopened and private sales continued, and it is claimed by the plaintiffs that she then agreed that if they would do this the sums already realized on sales of goods should be applied on the open accounts not covered by the notes and mortgage until the open accounts were paid and then applied on the notes. This agreement is denied by the defendant. She delivered some other collaterals to the plaintiffs, reopened the store, and again commenced to sell goods. Sales continued until some time in May, 1909, when plaintiffs again closed the store preparatory to a public sale, claiming that about $1,200 was still due them. At about this time the defendant obtained possession of the store and goods without plaintiffs' consent and refused to deliver it up to the plaintiffs again, and this replevin ac-

tion was then brought. The trial court directed a verdict for the defendant, leaving only the question of the value of the property to the jury, and the plaintiffs appeal.

For the appellants there was a brief by *C. W. Stilson* and *W. P. Crawford,* and oral argument by *Mr. Crawford.*

For the respondent there was a brief by *A. T. Rock* and *C. F. Morris,* and oral argument by *Mr. Rock.*

WINSLOW, C. J. Sec. 1770*b* of the statutes of this state (Stats. 1898) provides, among other things, that no foreign corporation shall transact business or acquire or dispose of property in this state until it shall have filed with the secretary of state a certain certificate and verified statement therein specified and paid a prescribed fee. The question sharply presented in this case is whether the taking and foreclosing of the mortgage in question are acts of interstate commerce. If a foreign corporation sells goods and delivers them from its place of business outside of the state to a man within the state, must the corporation comply with this law before it can receive or foreclose a mortgage on property in this state given to secure payment of the purchase price of the goods?

We think there can be no doubt as to the proper answer to this latter question. Such transactions are unquestionably acts of interstate commerce. *Greek-Am. S. Co. v. Richardson D. Co.* 124 Wis. 469, 102 N. W. 888. Sec. 1770*b* has no application to interstate commerce, because the exclusive power to regulate such commerce is vested in the Congress of the United States. *Loverin & B. Co. v. Travis,* 135 Wis. 322, 115 N. W. 829. There must be read into the section "an exception of such business as constitutes interstate commerce and an exception of such property as is acquired, held, or disposed of in this state in carrying on interstate commerce." *Elwell v. Adder M. Co.* 136 Wis. 82, 116 N. W. 882. "It cannot now be doubted that 'commerce' in the fed-

eral constitution comprehends all of the intercourse between the parties necessarily or ordinarily involved in a commercial transaction with reference to merchantable commodities." *Loverin & B. Co. v. Travis, supra,* at page 331.

In the light of these propositions which have already been laid down by this court, it seems that it can hardly be doubted but that the taking of security by mortgage for the payment of an interstate commerce debt is necessarily included within the scope of the term "interstate commerce." The interstate transaction cannot be said to be closed until the purchase price is paid. The taking of security for the payment of the purchase price is one of the ordinary incidents of a commercial transaction, not present in all, indeed, but frequently resorted to not only for the benefit and convenience of the seller but of the purchaser as well. To prohibit it or weight it down with burdensome conditions so as to materially interfere with its free exercise is certainly an attempt to regulate one of the very ordinary incidents of commerce. Without the right to receive security for the purchase price the foreign trader has lost one of the ordinary instrumentalities which make successful business possible, and a way has been found by which a state may impair the freedom of commerce between the states by making it difficult for the foreign trader to collect or secure his pay. So long as it appears that the security is taken for the *bona fide* purpose of securing and collecting an interstate commerce debt and is being enforced by ordinary and lawful methods for that purpose alone, the statute referred to can have no application.

There was sufficient evidence in this case from which these facts might have been found, and consequently the court erred in directing a verdict for the defendant unless there be other facts subsequently arising which justify the direction, notwithstanding the fact that the giving of the mortgage was an integral part of an interstate commerce transaction. Some contentions of this kind are made and will be noticed.

It is claimed by respondent that the mortgage has been canceled by failure to comply with sec. 2316*a*, Stats. (1898), and sec. 2316*c*, Stats. (Laws of 1903, ch. 122). The first of these sections prohibits a sale of personal property "taken" under a chattel mortgage except with the consent of the mortgagor before the expiration of five days from the time of taking, and the second provides that when property is "taken" and sold under a chattel mortgage the mortgagee shall file in the town clerk's office within ten days after the sale an affidavit giving the particulars of the sale. The penalty for violation of each statute is cancellation of the mortgage. The difficulty with the argument under the first section cited is that it does not apply where the mortgagor consents to the sale, and there was evidence of consent in this case (*Stevens v. Breen,* 75 Wis. 595, 44 N. W. 645); the difficulty with the argument under the second section is that this court has held that the section only applies where the property has been "taken" *in invitum,* not to cases where the mortgagee consented to the taking, and in this case there was, as before stated, direct evidence that *Mrs. Deschamp* consented to the taking. *Hammel v. Cairnes,* 129 Wis. 125, 107 N. W. 1089.

It is claimed that the mortgage was fully paid before the defendant retook possession of the goods in May, 1909. Upon this point the evidence is in some confusion. It appears by statements and accounts put in evidence that the total amount realized from the private sales between July 21 and October 1, 1908, was $2,060.24, from which necessary expenses amounting to $452.72 were deducted, leaving $1,607.52 to apply on the indebtedness; that after October 1st the plaintiff *F. A. Patrick & Co.* received from sales and from collections of collaterals $1,471.95, and the plaintiff *Finch Van Slyke & McConville* $671.48, making a total of $2,143.43. There is no complete statement of the expenses during this latter period, but from memoranda introduced such expenses appear to have been $409.24, leaving $1,734.19

to apply on the indebtedness. If these sums must be applied on the mortgage notes it seems that they must have been fully paid. But, as previously stated, the mortgage notes did not cover the entire indebtedness. It is claimed by appellants, and the claim does not seem to be seriously disputed by respondent, that respondent owed each of the appellants more than $2,000 when the mortgage was given, thus leaving a total unsecured indebtedness of more than $1,000. As before stated, $1,607.52 net had been realized in October, 1908, when the store was closed in preparation for a public sale. Had this all been applied on the mortgage debt it would still leave about $1,400 due thereon beside the $1,000 unsecured. At this time, however, *Mrs. Deschamp* went to Duluth and endeavored to persuade the plaintiffs to open the store and continue the private sales. The plaintiffs' testimony is that they finally consented to this on condition that the defendant execute a written paper authorizing them to apply all sums received upon the open accounts until they were paid, and a paper to this effect purporting to be signed by *Mrs. Deschamp* was introduced in evidence. The defendant denied the signature, but there was sufficient evidence to go to the jury on the question. In determining whether a verdict should have been directed for defendant the plaintiffs' evidence must be assumed to be true. Under all ordinary circumstances the debtor and creditor have a perfect right by agreement to control the application of payments between themselves, and the agreement that the money received be first applied on the unsecured indebtedness of $1,000 before application should begin on the mortgage notes would be unassailable. If assailable here it must be simply because it conflicts with sec. 1770*b*, Stats. (1898). But we are unable to see how it can be said to do so if it be granted that it was done in a *bona fide* attempt to give, on the one side, and receive on the other, security for the payment of an indebtedness resulting from interstate sales of goods. As before seen, all the in-

debtedness here resulted from such sales. It could be lawfully secured by mortgage, and manifestly it could have been lawfully secured without formal mortgage by turning the property over to the plaintiffs to sell until they had received their pay. This is really all that the agreement as to the application of payments amounts to if the plaintiffs' testimony be true.

It appears by the evidence that a considerable part of the account against *Mrs. Deschamp* on the books of *F. A. Patrick & Co.* was kept under the name of the Landry Mercantile Company, and it is claimed by the defendant that she is not responsible for this account. There was evidence on the part of the plaintiffs, however, that the account was so kept and goods so invoiced at the request of *Mrs. Deschamp,* on the ground that if goods were sent to her in her own name she might be involved in trouble with one Menno, to whom she had previously sold out her business and agreed not to go into business again. There was also evidence that *Mrs. Deschamp* in fact bought and received the goods charged in the name of the Landry Mercantile Company. If the facts were as testified to on behalf of the plaintiffs, we see no reason why she is not responsible for the price of the goods.

For the reasons stated there must be a new trial.

By the Court.—Judgment reversed, and action remanded for a new trial.

FALKENSTERN, Appellant, vs. TOWN OF GREENFIELD, Respondent.

February 3—February 21, 1911.

Appeal: Affirmance: Verdict directed on wrong ground: Evidence: Weight: Testimony at variance with natural laws: Waters: Injury from overflow: Defective bridge.

1. A judgment upon a directed verdict, though not sustainable upon the precise ground upon which the trial court rested it, will be affirmed if it appears from the record that the evidence would not have warranted a different verdict.
2. Testimony of a witness, even when uncontradicted by any instrument or by other testimony, may be rejected if, in the light of physical situations and matters of common knowledge, it is at variance with the laws of nature.
3. In an action by a millowner against a town for injury to his property by the overflow of a creek, alleged to have been caused by the fact that defendant in building a new bridge across the stream had narrowed the openings which formerly existed for the passage of the water, it is *held*, in view of the physical situation and the laws of nature, that the jury would not have been warranted in finding from the evidence that the change in the bridge was an efficient cause in producing the injury.

TIMLIN, J., dissents in part.

APPEAL from a judgment of the circuit court for Sauk county: CHESTER A. FOWLER, Judge. *Affirmed.*

Action to recover damages for creating and maintaining a nuisance to plaintiff's damage.

The claim of the plaintiff was that the town constructed a bridge across a creek below his mill property thereon, leaving an insufficient opening for the free passage of water as formerly, whereby water backed up, overflowed the banks of the stream and carried off some of his buildings and otherwise injured his property.

The claim of defendant was that although plaintiff's property was damaged by flood water at the time alleged, the injury was caused by his having maintained his dam in such an

insecure condition that it had frequently been washed out, depositing a large amount of *débris* in the creek bed between the dam and the bridge, thus interfering with and obstructing the flow of water to and past the bridge; that he knowingly maintained the dam in such insecure condition, and that the damage complained of was caused thereby.

The evidence was to this effect: Plaintiff owned a mill property on a small creek some 250 feet above the bridge in question. The mill and mill-race were on the left bank of the stream. The mill-dam on the left side was composed of a long solid bank of earth. At the right extending toward the right bank there was an old and a new spillway, the aggregate width being about ninety feet. Further to the right, forming the right wing nearly 100 feet long, there was a bank composed of brush, stones, and earth.

The water formerly left the spillway in a broad, thin stream, but by filling up of the creek by *débris* cast therein from time to time, by washings out of the dam, the waterway was caused to divide about forty feet from the foot of the dam, so that part of the water flowed to the right in a channel which narrowed at a point a short distance from the dam to a width of about sixteen feet and part flowed to the left in a channel which narrowed at a point about 100 feet from the dam to a width of about ten feet. The division between the two channels was about fifty feet. They came together about 240 feet from the dam and the way for the water was then under the bridge through two culvert openings having an aggregate width of twelve feet on the bottom, a height of five and one-half feet, and a cross-sectional area of seventy-two feet.

There was a large water-shed above the dam. The territory was so large that in heavy rains there was danger of the dam being carried out. Such occurrences had happened several times before the occasion in question. There were gates in the dam and splash boards thereon, which were removed

when necessary to prevent undue pressure on account of flood water. The removal of the splash boards on occasion of an existing freshet would cause a large quantity of water to be cast into the territory between the dam and the bridge, as the pond was quite large.

The right bank of the creek between the dam and the bridge raised about two feet above the water, ordinarily, when the mill was not in operation. The surface of the ground on that side back from forty to one hundred feet or so was about on the same level, then it sloped upward at an angle of some forty-five degrees for a considerable distance. The situation was such that from five to ten acres, or perhaps a little more of surface drained into the creek on the right side above the bridge and below the dam. The filled-in territory aforesaid was nearly as high as the banks of the creek. The left bank was about the height of the right bank. It was so low that a rise of water from the ordinary level of two feet or such a matter would cause the same to go out of the creek bed on either side. Near the foot of the left wing and around to the mill, a distance of about 130 feet the surface of the ground was somewhat higher than from a little further down to the highway and further on down the creek valley. The mill-race extended from a point in the left wing of the dam about 140 feet from the left side of the spillway nearly parallel with the downward course of the stream for a distance of about 140 feet, then turned to the right to serve the mill. The tail-race extended from the mill down the valley about 100 feet to and through a culvert over the highway and then on down the valley to an intersection with the natural creek bed. The highway was about parallel with the dam. The approach to the bridge on the right of the creek was raised a little.

On the left side of the roadway down to the creek there was a deep, wide gully made by action of the surface water. Down this gully on occasions of heavy rain storms a large

quantity of water flowed and into the creek just above the bridge. The fall from the foot of the dam to the bridge was about three feet. The territory bounded by the dam, the creek, the flume, the tail-race, and the highway was 150 feet wide near the dam, 250 feet on the creek line, and 240 feet on the side bounded by the highway. The highway from near the bridge to the tail-race was on the natural surface of the ground. The ground within the boundaries stated from near the foot of the left wing of the dam and the bank of the creek, which points were about two feet above the ordinary surface of the water in the creek, sloped a little down towards the highway so that a rise of water of about two feet would cause it to overflow the filled-in territory aforesaid and at the same time overflow the bank of the creek on the left for a distance above the highway of some 200 feet so as to cover a large part of the territory between the creek and the tail-race and pass over the highway and down the valley in a still broader sheet. The spread at the highway would be upwards of 200 feet wide in case of there being sufficient water to cover such area. The lay of the surface was favorable thereto.

Plaintiff's mill was located about midway between the left wing of the dam and the highway and about 130 feet from the left channel of the creek. His granary was located about twenty-five feet from the mill towards the creek and a little above the general level of the creek bank. His barn was below the highway, about twelve feet from the center line thereof and on a level with the general surface of the valley, as above indicated, and in the natural course of water overflowing from the creek between the bridge and the dam.

The bridge was constructed in 1903 to replace an old one. The latter had an opening for the passage of the creek about one half wider and of different form than the new one and sufficient to allow the full capacity of the creek to flow through it at all times. The form of the new construction

was not as suitable as the old one to accommodate a flow of water carrying floatable material liable to lodge and create obstructions. The old bridge narrowed the natural banks considerably and the new one about one third more. Formerly the water could reach the vicinity of the bridge flowing in a stream of considerable width. By reason of filling up by washing out of the dam, from time to time, that was narrowed to the two channels, aggregating about twenty-six feet wide. When the bridge was in progress of construction plaintiff protested to those doing the work that the openings were too small. After the new structure was put in, in case of a heavy rain, the water flowing into the creek on the left bank above the bridge would meet the water flowing from the dam and cause a rise and whirlpool motion of the water reaching up to the dam.

On the night of July 4, 1907, there was a heavy storm. Plaintiff was on the dam the greater part of the night. The water came down into the creek from the steep hillsides reaching for a distance of some twelve miles above the dam. It also came down in a large quantity from the territory on the right bank of the creek between the dam and bridge, particularly down the aforesaid gully on the side of the highway. From time to time as the storm progressed plaintiff took the splash boards off the dam. The water came down the gully, meeting the water of the creek, causing a whirling and backing up of the water to the dam. About 12 or 1 o'clock the barn collapsed from the action of the water and washed away. Later, as plaintiff testified, the dam went out. Sometime during the night the granary was caused to tip over by action of the water and other injuries to plaintiff's property occurred. No damage was caused to plaintiff's property by insufficiency of the culvert till the occasion in question.

At the close of the evidence the court directed a verdict in favor of the defendant upon the ground that the evidence showed the damage to plaintiff's buildings to have occurred before the dam broke and by reason of the natural freshet

flow of the stream, and that such flow below the dam and above the bridge was so obstructed by the filling up caused by plaintiff after the building of the bridge; and that such obstruction efficiently contributed to cause the overflow and the damage. Judgment was rendered accordingly.

For the appellant there was a brief by *Bentley & Kelley,* and oral argument by *F. R. Bentley.*

For the respondent there was a brief by *Daniel Ruggles* and *John A. Aylward,* and oral argument by *Mr. Ruggles.*

MARSHALL, J. Whether the trial court was warranted in directing a verdict in favor of respondent upon the ground that the evidence conclusively showed negligent maintenance by appellant of the dam to have efficiently contributed to produce the injury complained of, in that it resulted in the natural bed of the creek between the dam and the bridge being filled up by *debris* cast there upon occasions of the dam being washed out, and that such filling obstructed the flow of water to and through the openings under the bridge, materially adding to the danger of water overflowing the creek banks above the bridge and reaching appellant's improvements with damaging effect, does not appear very satisfactorily. It is doubtful, at least, whether the judgment could be sustained upon the precise ground the trial court rested it, but there is a much broader one in favor of respondent which seems to be insurmountable.

The claim of appellant that the natural flow of the stream below the dam, augmented by water which came into the creek from the few acres of surface on the right bank, was so obstructed at the bridge as to overflow the creek bank on the left side in such quantity as to form a deep powerful torrent reaching to and engulfing the barn and granary, located as indicated in the statement, overturning the latter and causing the former to collapse and float away,—is too incredible for belief.

The story told by appellant that the occurrence to the barn

took place long before the dam went out taxes our credulity at least to the limit. There is a boundary beyond which a witness cannot go and have his evidence entitled to any weight in determining the truth as to a controverted question of fact. It is a mistake to think everything which a witness may say under oath, however preposterous, is proof. The story of a witness on the stand, uncontradicted by any instrument or statement from the mouth of any other witness, may, in the light of physical situations and matters of common knowledge, convict him of at least being conclusively mistaken. In suggesting this we do not intend to go so far as to decide that the appellant in this case told a false story as to the time when the barn floated off with reference to when the dam went out. For the purpose of the case, it may be assumed that the story, however incredible, is a true one and the result would be the same as we view the record.

The laws of nature cannot be turned aside by the story of any witness or number of them. Water will flow down hill and in all such directions till it comes to a level, and a few inches of disturbance of the level within such distances as are material to this case, that is from point to point in the territory bounded by the creek, the dam, the mill flume and race, and the highway; will inevitably, in case of the volume being large, cause a rapid, forceful flow. The lay of the ground was such that before water in the downward course on the left side of the creek was sufficient to reach and do the damage to the buildings complained of, it must have been several feet deep and in a stream reaching from the bank of the creek toward the flume over 100 feet and below the mill, covering practically the whole width between the creek and the tail-race, a distance of nearly 200 feet. It cannot be that water flowing into the creek just above the bridge formed any material part of such a great body. It must have come from above the dam, primarily; territory hundreds of times greater in area than that served by the inflow to the creek between the dam and the bridge.

The evidence from the mouths of witnesses is that the rain storm was not extraordinary, yet, by undisputed evidence, for the four years the bridge had been maintained, as at the time of the occurrence in question, it had not caused any injury to appellant's property. That there were some hard storms in the meantime the evidence amply shows. Therefore, assuming that the witnesses were correct in saying that there was nothing extraordinary about the storm in question, certainly some other extraordinary occurrence must have taken place to have caused such an immense body of water to come from the territory above the line of the dam as was flowing down the valley outside the banks of the creek at the time the barn floated off. Such an occurrence is not consistent with the direct evidence, except that appellant took off the splash boards from his dam before the barn moved off. Of course, in view of the size of the flowage above the dam and the storm, the removal of the splash boards must have greatly augmented the natural freshet flow of the stream; and yet it is hard to believe it could have done so sufficiently to have produced such a deep, broad stream as that mentioned.

The only complaint about the bridge is that the openings were decreased in capacity by a narrowing of about one third. As the opening practically was unobstructed the morning after the dam went out, it must have been so during the night in question. There was nothing in the changed characteristics of the bridge, from the time when it was confessed that it did not obstruct the stream, to account for the great flood passing down the highway, except narrowing of the opening about six feet. That such narrowing could not have caused the flood is plain beyond room for reasonable controversy. If such narrowing had caused water to pass down on the left bank across the highway it could not have been sufficient, under the circumstances, to create a stream of any great depth. If the whole opening in the bridge, as it formerly existed, had been closed up so as to compel the entire ordinary freshet flow of the stream to pass down the valley on the left bank, the spread

would have been so great that no such broad, deep flow would have occurred as must have existed at the time the barn collapsed and floated off and the granary toppled over.

So irrespective of whether the filling up of the channel below the dam by *débris* from the dam previous to the occurrence in question, proximately, to any extent, caused the damages complained of, it is very plain that the jury would not have been warranted in finding from the evidence to a reasonable certainty that the change in the bridge had anything substantial to do with the matter.

By the Court.—Judgment affirmed.

TIMLIN, J. I concur in the result but not in all that is said in the opinion. I have not that confidence in my knowledge of physical situations as established by oral evidence nor in my grasp of "matters of common knowledge" which would enable me to thereby impeach and discredit a witness. I may be pardoned for doubting whether others have such power.

Testimony which is demonstrably false may no doubt be rejected, as if one should testify that the square root of 64 was 9, or that the sum of the interior angles of a triangle was greater than two right angles. Testimony might also in some cases be rejected which was so much in conflict with known natural laws that the act or event testified to would be a miracle. But not every one would agree with this last proposition. In every case, however, where the physical situation is itself derived or imagined from oral narrative, even if the latter be uncontroverted, and in all that vast number of instances where common knowledge may possibly be only common error, there should be no such rule for weighing testimony.

SCHOENMANN and another, Appellants, vs. HOOD, Respondent.

February 3—February 21, 1911.

Judgment: Opening default: Discretion: Chattel mortgages: Sale: Failure to file affidavit: Extinguishment of debt.

It was not an abuse of discretion to vacate a judgment on cognovit upon notes secured by chattel mortgage and permit the defendant to interpose a defense to the effect that the debt had been extinguished by voluntary acts of plaintiffs in failing to comply with sec. 2316c, Stats. (Laws of 1903, ch. 122), especially where defendant was merely a surety. Permission to interpose that defense should not be refused in such a case on the ground that the rights conferred by the statute operate inequitably.

APPEAL from an order of the circuit court for Sauk county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

The record shows the following facts in this case: On September 30, 1905, the defendant's son purchased an engine from the plaintiffs, giving in payment therefor six promissory judgment notes, each for the sum of $237.50. To secure payment of these notes he gave a chattel mortgage upon the engine, which was duly recorded. The defendant signed the notes as surety. Shortly thereafter the son of the defendant died. On September 28, 1907, the plaintiffs credited $718.83 on the notes as the net proceeds of the sale of the engine, of which they had taken possession. No affidavit or papers, as required by sec. 2316c, Stats. (Laws of 1903, ch. 122), were filed with the town clerk. On June 3, 1909, the plaintiffs took judgment on cognovit against the defendant, the action being based on these judgment notes. As soon as possible after learning of the judgment the defendant made application to the circuit court to have the judgment opened and to be allowed to defend. The petition asking the court to open the judgment set forth the proposed answer to the complaint, in which the defendant alleges that the

failure of the plaintiffs to comply with sec. 2316*c*, Stats., had extinguished the indebtedness evidenced by the promissory notes and rendered them void and of no effect. The defendant asked that the judgment be opened and that she be allowed to make her defense.

This is an appeal from the order of the court opening the judgment on condition that the motion fees and disbursements be paid and that any liens existing by virtue of the judgment remain in full force and effect to await the final judgment in the case.

Thos. W. King, for the appellants.

For the respondent there was a brief by *Grotophorst, Evans & Thomas,* and oral argument by *E. A. Evans.*

SIEBECKER, J. The application to open this judgment is one which calls for the exercise of a sound discretion of the court upon the facts alleged by the petitioner. It is alleged that the petitioner in this case is a surety on the notes upon which the judgment was awarded and which was opened by the order of the court. The facts alleged set up a defense under sec. 2316*c*, Stats. (Supp. 1906: Laws of 1903, ch. 122), and if established show that under the provisions of this statute the debt has been extinguished by the voluntary conduct of the plaintiffs. The facts alleged are sufficient to constitute a defense under this statute and they are sufficient to show a probability that the petitioner presents a legal defense to the notes, which, if established, will relieve her from all liability thereon. The facts and circumstances alleged show that she has not forfeited any right to defend upon the grounds alleged.

The question then arises, Is the defense, as appellants contend, one she should not be permitted to interpose? To say that the alleged defense is inequitable is to say that the rights conferred by the legislative enactment, as embodied in sec. 2316*c*, Stats., operate inequitably and should not be avail-

able to a party in an equitable proceeding. We cannot so regard the statute, and believe the courts must declare and enforce it as it stands and award to all persons within its purview the opportunity to enforce whatever rights they may have acquired under it.

A very good reason for opening the judgment to let in the defense under this statute is that it rests on the voluntary acts of the plaintiffs in omitting to comply with the statute and thereby extinguishing a debt which would have subsisted had they complied with the law.

It is also alleged that the petitioner is a surety, and as such she is entitled to stand strictly on the rights the law affords her.

We find the action of the trial court to be free from any abuse of judicial discretion.

By the Court.—The order appealed from is affirmed.

STATE EX REL. DICK, Respondent, vs. KALAHER, Appellant.

February 3—February 21, 1911.

Intoxicating liquors: Licenses: Saloons near schools.

1. A "school," within the meaning of subd. 5, sec. 1548, Stats. (Supp. 1906: Laws of 1905, ch. 385), is not measured by the walls of a building. One school may occupy two or more buildings, or two or more schools may occupy one building.
2. Where two school buildings were located on the same grounds and in one of them, a high school building, there were high school pupils and grade school pupils and in the other there were grade school pupils, the high school building and the pupils enrolled therein did not constitute a "school" within the meaning of said statute.

[3. Whether in such case there was more than one school upon the grounds, not determined.]

APPEAL from a judgment of the circuit court for Sauk county: E. RAY STEVENS, Circuit Judge. *Reversed.*

This is a *certiorari* proceeding brought by respondent, *J. M. Dick,* to review the proceedings of the common council of the city of Baraboo in granting the appellant a liquor license upon premises within 300 feet of the grounds upon which a school was conducted. It is claimed by respondent that a proper list of all parents and guardians of the pupils attending said school, together with a remonstrance signed by a majority of all the parents and guardians, were duly filed as provided by subd. 5 and 6 of sec. 1548, Stats. (Supp. 1906: Laws of 1905, ch. 385). This is denied on the part of appellant. The court below reversed the action of the common council in granting the license, on the ground that it appeared from the return to the writ of *certiorari* that a majority of all parents and guardians of pupils in the high school building signed the remonstrance, and further held that the phrase "any public school" as used in subd. 5 of sec. 1548 refers to a single building in which a school is held. Judgment was rendered against the appellant reversing the action of the common council with costs, from which this appeal was taken.

For the appellant there was a brief by *Grotophorst, Evans & Thomas,* and oral argument by *E. A. Evans.*

V. H. Cady, city attorney, in support of the action of the common council.

A. J. Gemmill, for the respondent, as to the meaning of the words "any public school" in subd. 5, sec. 1548, Stats. (Supp. 1906: Laws of 1905, ch. 385), cited *In re Townsend,* 195 N. Y. 214, 88 N. E. 41, 43; 35 Cyc. 811; *In re Sanders,* 53 Kan. 191, 36 Pac. 348, 23 L. R. A. 603; *Board of School Comm'rs v. State ex rel. Sander,* 129 Ind. 14, 28 N. E. 61, 63–65, 13 L. R. A. 147; *Betts v. Betts,* 4 Abb. N. C. 317, 405, 414; *Comm. v. McDonald,* 160 Mass. 528; *Comm. v. Whelan,* 134 Mass. 206–208, 210; sec. 461*r,* Stats. (Supp. 1906: Laws of 1901, ch. 321); sec. 461*s,* Stats. (Laws of 1909, ch. 256).

KERWIN, J. Subd. 5 of sec. 1548, Stats. (Supp. 1906: Laws of 1905, ch. 385), provides in substance that after June 30, 1905, no license shall be granted to any person for the sale of liquors in any building or place for which a license is not in force on June 30, 1905, within a distance of 300 feet of any public or permanently established parochial school grounds, such distance to be measured upon the streets from the boundaries of the school grounds, and that whenever after January 1, 1908, a list of all the parents and lawful guardians of the children enrolled as pupils in any public school or permanently established parochial school, together with a remonstrance in writing signed and acknowledged before a notary public by a majority of such parents and lawful guardians, are filed with the city, village, or town clerk, as the case may be, describing the premises for which a license had previously been issued within 300 feet of the grounds of such school and demanding that no license be granted, no such license shall thereafter be granted to any person for the sale of liquors on such premises. Subd. 6 of sec. 1548 provides in effect that the foregoing provisions shall not apply to drug stores, hotels, nor restaurants actually established and maintained as such prior to February 1, 1905, and further provides that it shall be the duty of the city, village, or town clerk, as the case may be, to receive, file, and record such list and remonstrance.

The respondent attempted to proceed under this law and filed a list and remonstrance with the city clerk, which list and remonstrance were considered by the council on the application of the appellant for a license at 404 Oak street, and the matter referred to the license committee appointed by the common council, which committee reported, and their report was confirmed by the common council and the license granted to appellant.

A great many errors are assigned and argued by counsel for appellant which were not considered or determined by

the court below, and which, as we view the case, are not necessary to be considered or decided here. It appears from the return of the city clerk to the writ of *certiorari* that the license committee to whom was referred the remonstrance and list of parents and lawful guardians of children enrolled in the public school the grounds of which are within 300 feet of the building situate at 404 Oak street, wherein the respondent had applied for a license, found that the list presented did not contain a list of all the parents and lawful guardians of children enrolled as pupils in the school situated on the high school grounds; that the list and remonstrance contained names of divers persons called or calling themselves guardians who were not in fact the lawful guardians of the respective children mentioned therein; and that the names on the list and signatures to the remonstrance of the persons so appearing as parents of children not enrolled or as guardians of children of whom they are not lawful guardians should not be counted; that the list presented does not contain the names of all parents and lawful guardians in the seventh and eighth grades of said school, containing in the aggregate 170 pupils whose parents and guardians do not appear on such list. The committee further found that the remonstrance did not comply with the statute and was not signed and acknowledged by a majority of all parents and lawful guardians of children enrolled as pupils in said school; that there were approximately 638 parents of children so enrolled, and the highest number of signers to the remonstrance was 263. This report was confirmed by the council, as appears from the return, after due consideration and after hearing the respondent in support of the remonstrance. There is substantially no dispute on the facts, and the only question which it is necessary to consider on this appeal is whether the list and remonstrance were sufficient.

This inquiry involves the construction of the statutes as to what constitutes a school. If the pupils in both the high

school and the grades constitute the school contemplated by the statute, then it is established by the record that neither the list nor the remonstrance was in compliance with the statute. If, on the other hand, either the grade school or the high school constitutes a school within the statute (a point we do not decide), then it is equally clear that there was no compliance with the statute, for the reason that it does not appear that all the parents and guardians of pupils in either of such schools are included in the list, or that a majority of all the parents and guardians of pupils in either school signed the remonstrance. The learned trial judge below held that the phrase "public school" in the statute means a school maintained in one public school building, and that a majority of all parents and guardians of pupils in the high school building signed the remonstrance; therefore the common council was without authority to grant the license to the appellant. We cannot agree with the learned court below in this regard. The limits of a school building do not necessarily constitute the limits of a school. Parts of different schools may be in the same building, or one school may occupy two or more buildings. There were in this high school building high school pupils and grade school pupils. As we have before observed, if all of the pupils constituted but one school, clearly the list and remonstrance were insufficient, and if there were two schools it is not material whether pupils of such schools were in one building or in two; they would still continue to be two schools or separate institutions. A school is defined to be "an institution of learning of a lower grade, below a college or a university. A place of primary instruction. The term generally refers to the common or public schools, maintained at the expense of the public." Black, Law Dict. "School is a generic term, and denotes an institution for instruction or education." *American Asylum v. Phœnix Bank,* 4 Conn. 172; 7 Words & Phrases, 6343.

The word "school" is applied to institutions which are con-

fined to some special grades of instruction. *Comm. v. Banks,* 198 Pa. St. 397, 48 Atl. 277. A school or institution of learning is not measured by the walls of a building. It may occupy one building or it may occupy two or more. So we think the trial court was in error when it held that the high school building and the pupils therein constituted a school within the meaning of the statute. We do not decide here whether all the pupils in the different departments of the school on the school grounds constituted but one school, because it is unnecessary to the decision of the case. But if there be more than one school on the grounds, which schools are attempted to be covered by the list and remonstrance, it is clear from the record that no school has complied with the law.

Some points are made by counsel for respondent and which were not passed upon by the court below, respecting sufficiency of publication of the application of appellant for a license, approval of the bond under ch. 336, Laws of 1909, and the regularity of the proceeding by the common council to determine the issues raised by the application and the remonstrance. We do not find that the respondent was prejudiced by any of the alleged irregularities complained of, even if he could raise them here.

It follows that the judgment of the court below must be reversed.

By the Court.—The judgment of the court below is reversed, and the cause remanded with directions to quash the writ.

DALEY, Respondent, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

February 3—February 21, 1911.

Railroads: Ejection of trespasser from train: Excessive force: Liability: Authority of baggageman: Scope of employment: Questions for jury.

1. From the fact that a servant is intrusted with the charge of a vehicle for certain purposes a jury may infer that he is authorized to exclude therefrom trespassers or persons endeavoring unlawfully to use the vehicle for other purposes.
2. Although the authority to eject trespassers from a train be vested in the conductor, yet if by the rules the baggageman has charge of the baggage in a car and it is his duty to report to the conductor the presence of trespassers on said car and, when requested by the conductor, to aid in ejecting them, such baggageman may be found by the jury to have been acting within the scope of his employment in endeavoring to eject a trespasser from the baggage car without calling upon the conductor.
3. If in such case the baggageman use unnecessary or excessive force his employer is liable.
4. Authority given to a conductor to eject from his train any passenger who refuses to produce a proper ticket or pass or to pay fare includes authority to eject a trespasser who makes a like refusal.
5. One who attempts to ride on a train without ticket, pass, or payment is ordinarily a trespasser.

APPEAL from a judgment of the circuit court for Dane county: S. D. HASTINGS, Judge. *Affirmed.*

For the appellant there was a brief by *William G. Wheeler* and *Ralph W. Jackman,* and oral argument by *Mr. Jackman.* They cited, besides other cases, *Bolin v. C., St. P., M. & O. R. Co.* 108 Wis. 333, 84 N. W. 446; *Winkler v. Fisher,* 95 Wis. 355, 70 N. W. 477; *Boyce v. Wilbur L. Co.* 119 Wis. 642, 97 N. W. 563; *Nagle v. Hake,* 123 Wis. 256, 101 N. W. 409; *Rylander v. Laursen,* 124 Wis. 2, 102 N. W. 341.

For the respondent there was a brief by *Aylward, Davies,*

Olbrich & Hill, and oral argument by *M. B. Olbrich.* They cited *Schultz v. La Crosse City R. Co.* 133 Wis. 420, 113 N. W. 658, and other cases.

TIMLIN, J. In this case the defendant appeals from a judgment for $1,600 and costs rendered upon a special verdict finding that defendant's baggageman caused the injury by pushing the plaintiff from a baggage car while the train was moving; that the baggageman was guilty of reckless or wanton conduct in so doing, and that the act was within the scope of his employment. It appeared without dispute that the plaintiff was injured while attempting to "steal a ride" on the front platform of defendant's baggage car.

It is claimed that there is no evidence to support the finding that the baggageman was within the scope of his employment in ejecting the plaintiff from the baggage car. No written rule or by-law of the corporation is produced relating expressly to trespassers on defendant's cars. Written rules are in evidence to the effect that baggagemen will be held responsible for any damage to, loss, or miscarriage of baggage resulting from carelessness. That they must remain in the baggage car while on duty unless otherwise instructed by the conductor, and not leave the car at the end of their run until all baggage is delivered to the station agent or station baggageman. Baggage-car doors must be securely locked at all times, and no person except those in the performance of duty may enter the baggage car. Another rule relates exclusively to disorderly passengers, and still another to the ejectment of passengers. This last contains the following:

"In all cases, on the refusal of any passenger to produce a proper ticket or pass, or to pay the fare, the conductor shall cause the train to be brought to a full stop at a regular open station, require such person to leave the train, and, on refusal, shall remove him or her therefrom. . . . A sufficient

force must be brought into requisition to overcome resistance, and to place the person on the ground without inflicting injury, the law being that conductors may command employees or any of the passengers to assist in such removal."

Authority to eject a passenger who refuses to produce a proper ticket or pass or pay the fare would certainly include authority to eject a trespasser who made like refusal. One who attempts to ride without ticket, pass, or payment would ordinarily be a trespasser. The plaintiff, as an expert having a long and varied experience in stealing rides, was permitted to testify to the custom and practice of baggagemen when they find a trespasser on the front end of the baggage car. It is not necessary to pass upon the correctness of this ruling because the defendant does not desire a new trial of the case. We shall eliminate this item of evidence in our investigation. One McCoy, who had been in the employment of the defendant as locomotive fireman up to 1895, testified that it was the practice and custom in the operation of that road for baggagemen to put tramps off the platform of the baggage car. Hyland, an expressman who worked on the same road up to about ten years before the trial, gave like evidence; and on the part of the defendant, Cannon, the conductor of the train in question, testified that it was not the practice or custom of baggagemen to eject trespassers from the baggage car; and Whitney, another conductor, and other employees of the defendant testified that it was not the custom for baggagemen on the Northwestern road to eject a trespasser found on the head end of the baggage car, but the baggageman notifies the conductor by word or signal. The trespasser is invited into the baggage car by the baggageman and sent back to the smoker and reported to the conductor.

The question is not free from difficulty and was ably presented. The verdict must be supported if at all under the following precedents:

In *Bergman v. Hendrickson,* 106 Wis. 434, 82 N. W. 304,

a servant was employed as bartender and engaged in such duties. An intoxicated person entered, made two or three purchases of liquor, and refused to pay. The barkeeper assaulted and injured him and he brought an action for damages against the employer. It was ruled that if this assault was committed with the purpose and in the line of enforcing payment for this liquor the employer would be liable.

"It was his [the employee's] method of performing the duty delegated to him, and, although the method may not have been either expressly authorized or even contemplated,—nay, although it may have been expressly prohibited,—yet the master is liable for the damages caused thereby, provided he has intrusted to the servant the duty he was attempting to perform."

In that case authority to collect for drinks sold to guests or customers was a permissible inference by the jury from the fact that the employee was charged with the duty of making sales and in charge of the saloon.

In *Johnston v. C., St. P., M. & O. R. Co.* 130 Wis. 492, 110 N. W. 424, a servant employed as night watchman was charged with the duty to prevent property from being stolen and see that cars were not damaged. A general agent of the corporation defendant instructed this night watchman to investigate and report concerning the throwing of sticks by boys at the passenger coaches of the railway company. In carrying out these orders the night watchman assaulted and imprisoned the plaintiff with a view of endeavoring to ascertain who committed the offense. The court said:

"It is contended that authority to investigate does not imply authority to do unlawful acts in the execution of such duty, and that when Gallagher unlawfully assaulted and imprisoned the plaintiff he was not within the scope of his duty. But, since he had authority to investigate and was thus engaged, his acts, though unlawful, were binding upon his master. A master is liable for the tortious act of the servant

done in the scope of his employment, though the master did not sanction it, or even though he forbade it."

In *Wilson v. Noonan,* 27 Wis. 598, it was held that the employer was responsible for libel by an agent where the latter was employed to translate written productions from one language to another and publish the same as translated, although the translation was incorrect and the particular libelous words in the foreign language were unauthorized by the master.

In *Schultz v. La Crosse City R. Co.* 133 Wis. 420, 113 N. W. 658, the employer was held liable for an assault and battery by its servant upon evidence from which the jury was authorized to infer that the servant was in charge of a car belonging to the master and that the assault was for the purpose of protecting the master's property from trespass. Here the jury was permitted to infer that one in charge of a vehicle is or may be authorized to exclude from such vehicle trespassers or intruders, and the inference of fact is in accord with common sense and the experience of mankind. It would be most strange and unusual if one were to send his servant to the station with a carriage or automobile, or to the gravel pit for a load of gravel, and yet the servant have from his charge of the vehicle no authority to eject intruders who might insist upon climbing on the vehicle and riding free.

In *Evans v. Davidson,* 53 Md. 245, a farm hand was employed to do general farm work. While engaged in cultivating corn a cow broke into the cornfield from an adjoining farm. Without any direction to that effect the farm hand undertook to drive out the cow, and in so doing struck her with a stone and killed her in the field. It was held to be a question of fact for the jury whether the act of driving out the cow was within the scope of the servant's employment under such circumstances. It was considered that if the servant be acting at the time in the course of his master's

service and for his master's benefit within the scope of his employment, then his act, though wrongful or negligent, should be treated as the act of the master although there was no express command. The court said:

"What is embraced, as commonly understood, in general farm work? In the very nature of the employment there must be some implied authority and duties belonging to it; and this as well for the protection of the master as third parties. If, for instance, a servant thus employed should see a gate open or a panel of fence down, through which a herd might or would likely enter and destroy his master's grain, we suppose all would say, that it would be the positive duty of the servant to close the gate or put up the fence, to prevent the destruction of the grain; and if he should pass by and wilfully neglect such duty, it would constitute cause and a sufficient justification for the discharge of the servant. If that be so, how much more imperative the duty, where, as in this case, in the absence of the master, the servant being in the field at work, and seeing a herd of cattle break into the field, and in the act of destroying corn, to drive out the cattle and thus to save the corn from destruction?"

From the foregoing precedents it is easy to derive a rule that, where one is in charge of his master's vehicle with the right to use it for certain purposes, the jury may infer that it is within the scope of his employment to expel intruders or trespassers who attempt to use the vehicle for other, unlawful, or unauthorized purposes. But where there are several servants the master may select which of these he will put in charge or upon which of these servants he will confer the authority to protect the property against trespassers. This will rebut such authority on the part of other servants if nothing else appear. This appears to have been done in the instant case, but still leaving with the baggageman a duty relating to trespassers who attempt to steal a ride on the baggage car. This duty did not include the ejection of the trespasser, but it did call on the baggageman, when he observed the act of trespass, to give information to the con-

ductor and thus call into action the forces provided by the master for the humane and careful ejection of the trespasser, as in case of the passenger without a ticket or pass who refused to pay fare. By the written rule the baggageman had the further duty to aid the conductor in ejecting a trespasser when called upon by the former. In the instant case, instead of discharging this duty in the manner prescribed, the baggageman undertook in his master's interest to discharge it by the short cut of himself expelling the trespasser without calling the conductor or waiting for his orders. Had the baggageman not used excessive force his act would have been legal. But from these regulations of his employment the jury might infer that his act, while outside the express authority conferred upon him, was yet within the scope of his employment. They might say of the baggageman as was said by Justice DODGE in *Bergman v. Hendrickson,* 106 Wis. 434, 82 N. W. 304: "It was his method of performing the duty delegated to him."

Having observed the trespasser he should have called the conductor and left the latter to deal with him, except that if required by the conductor he must assist in expulsion. He did not call the conductor nor wait for his orders, but undertook to expel the trespasser without this detail of procedure, and in so doing, as found by the jury, used excessive and unnecessary violence. There was therefore evidence to support the verdict.

Subordinate questions are also presented by the appeal, but we have not considered it necessary to discuss them at length.

By the Court.—Judgment of the circuit court affirmed.

KUEHN, Appellant, vs. NERO and MENOMINEE RIVER SUGAR COMPANY, Garnishee, Respondents.

February 4—February 21, 1911.

Appeal: Defective undertaking: Amendment: Justices' courts: Garnishment: Sale of goods to foreign corporation: When title passes: Property in transit not "in the hands" of consignee.

1. An undertaking on appeal, defective because of insufficient justification of the sureties, may be amended in that particular after a motion to dismiss and even after the time has expired within which an appeal could be taken.
2. If the title to goods sold to a foreign corporation had passed at the time of the service of a garnishee summons upon the purchaser, the garnishment proceeding will not lie, since a credit held in another state cannot be reached.
3. Under a contract for the growing of beets and delivery thereof to a sugar factory, providing that all beets testing under a certain per cent. of sugar would not be received or paid for, title to the beets did not pass until after they were tested.
4. Property delivered by the vendor to a carrier and in transit at the time a garnishee summons is served on the consignee, even if the possession of the carrier is technically that of the consignee, is not "in the hands" of such consignee within the meaning of sec. 3719, Stats. (1898), relating to garnishment in justices' courts.

APPEAL from a judgment of the circuit court for Shawano county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

In February, 1902, plaintiff commenced an action of replevin against the defendant to recover a cow. During the pendency of the action the parties stipulated that the defendant might retain possession of the animal until the justice rendered his decision in the action. The justice found in favor of the plaintiff and entered an order in his docket requiring the defendant to deliver the possession of the cow to the plaintiff and also assessed plaintiff's damages for the wrongful detention of the animal at $25, for which sum judgment was entered with costs. The defendant never com-

plied with the order, and the judgment for damages and costs has not been paid. An execution was issued on the judgment on November 6, 1905, and the officer returned that he was unable to find any property out of which the same might be satisfied. Such execution did not correctly state the amount of the judgment on which it was issued. On November 7th a garnishee summons based on the execution was served on the agent of the *Menominee River Sugar Company,* a foreign corporation. That company first answered admitting liability as garnishee, but later filed an amended answer setting forth in detail the transaction between it and the defendant, the substance of which was as follows: On March 22, 1905, the defendant and the garnishee entered into a contract whereby the defendant agreed to plant one acre of land to sugar beets, the seed to be furnished by the garnishee. The contract provided that all beets raised thereunder should be delivered to the garnishee as requested after October 1st and that they should be delivered to the company on board cars on Siding No. 170, and there weighed and tared under the direction of the company's representative. The company agreed to pay the freight on the beets. When the grower loaded beets at a point where there were no wagon scales the beets should be weighed and tared at the company's factory at Menominee, Michigan. The price agreed upon was $4.60 per ton. The contract also provided that "the company will not accept beets grown from seed not furnished by them, nor will they receive or pay for rotten beets nor beets testing under ten per cent. of sugar." The defendant produced a carload of beets under this contract and loaded the same into a car on November 4, 1905, at the siding specified. The beets arrived at Menominee, Michigan, on November 12, 1905. How they were routed or where they were when the garnishee summons was served does not appear. Judgment was rendered in the action dismissing the garnishee proceedings.

F. Y. King, for the appellant.

For the respondents there was a brief by *Olen & Olen,* and oral argument by *W. A. Olen.*

BARNES, J. The respondent moved to dismiss the appeal because of insufficient justification of the sureties to the undertaking on the appeal. After the motion was made the appellant amended the undertaking so as to conform to the statute. The correction was made after the time had expired within which an appeal might be taken. The motion presents substantially the same situation as was before the court in *Ady v. Barnett,* 142 Wis. 18, 124 N. W. 1061, and under the ruling of that case the motion to dismiss must be denied.

The court found that the judgment in the replevin action was void; that the execution issued thereon was void even if the judgment were valid; and that the garnishee had no money or property in its hands belonging to the defendant at the time the garnishee summons was served. It is unnecessary to pass upon the first two grounds upon which the court based its decision, although it might not be out of place to remark that under the later decisions of this court, such as *Givans v. Searle,* 136 Wis. 608, 118 N. W. 202; *Cowles v. Neillsville,* 137 Wis. 384, 119 N. W. 91; and *Kremer v. Arians,* 141 Wis. 662, 124 N. W. 1064, the judgment and execution were held void on technical grounds which would hardly meet our approval.

In support of the third ground upon which the court based its decision, it is urged that money or property situated outside of the state is not subject to garnishment, and it was so held in *Bates v. C., M. & St. P. R. Co.* 60 Wis. 296, 302, 19 N. W. 72, and in *Morawetz v. Sun Ins. Office,* 96 Wis. 175, 179, 71 N. W. 109. One sufficient reason for so holding is that a garnishment is to all intents and purposes a levy on the property of the defendant in the hands of the garnishee, and that extraterritorial effect cannot be given to writs and proc-

esses of this character issued by our courts. So unless this case falls without the rule of the cases referred to the attempted garnishment was unavailing.

We can conceive of but one ground upon which the garnishment proceeding could possibly be sustained. The beets were loaded in a car on November 4th at a railroad siding in Shawano county. The garnishee summons was served on November 7th and the car was received by the garnishee on November 12th at Menominee, Michigan. We do not think, under the terms of the contract between the defendant and the garnishee, the title to the beets passed until after they were tested. If it did, then clearly the proceeding would not lie, because the liability of the garnishee would be confined to the sum of money due or to become due for the beets, and a credit held in a foreign state could not be reached. If, however, the title had not passed, and the beets were delivered by the defendant as soon as they were loaded, technically it might be said that the possession of the carrier was the possession of the garnishee and that the latter had property in its possession belonging to the defendant within the state of Wisconsin. We say "might," because the evidence does not disclose where the beets were on November 7th, except as an inference might be drawn from the testimony showing the date of loading and the time they were received. Drawing the inferences from the evidence that are most favorable to the plaintiff, there remains to be considered whether the possession of the garnishee was sufficient to support the action against it. The actual physical possession was in the carrier, who was a bailee for hire. To hold that a theoretical or constructive possession of this character would support a garnishment would place litigants in anomalous situations and lead to confusion and injustice. The statute fixing the liability of a party garnished in justice's court (sec. 3719, Stats. 1898) is ancient, and was adopted under conditions materially different from those which now exist and when the

railroad mileage within the state was insignificant, if indeed there was any at all. Sec. 3725, Stats. (1898), requires a manual delivery of the property in the possession of the garnishee to the justice, when the garnishee is held liable. If the garnishee found that the beets did not comply with the contract after they were tested, and elected to reject them for that reason, do the statutes cited contemplate that it must reship the beets to the nearest station to the justice and unload and deliver them at his office? We apprehend that many contracts are made by which goods are delivered to the purchaser on board cars, with the right to inspect and reject at destination if they do not comply with the contract of sale. If service could be made on the vendee while the goods were in transit, at a place distant from his residence, it would be unreasonable to say that he must return the goods to the justice before whom the proceeding is pending in the event of his refusing to accept them as a compliance with the contract of sale. It can make no difference in the case before us that the vendee elected to accept the beets. Its liability, if any there was, was dependent on whether it had property in its possession within the state belonging to the defendant when the garnishee summons was served. If it had any such property it consisted of beets. If the garnishee could not be obliged to turn over the beets in case it elected not to use them, then it could not be held for their value if it elected to keep and pay for them. The statute (sec. 3719, Stats. 1898) makes the garnishee liable for the property "in his hands belonging to the defendant." We do not think that property delivered to a carrier, and in transit when a garnishee summons is served, is "in the hands" of the consignee within the meaning of this statute. It seems to contemplate actual manual possession.

By the Court.—Judgment affirmed.

NEWTON, Appellant, vs. NEWTON, Respondent.

February 4—February 21, 1911.

Alimony: Discretion: Reduction of amount: Appeal: Review.

1. **The decision of the trial court in the allowance of alimony will not be disturbed on appeal unless manifestly unjust.**
2. **Reduction of alimony in this case from the original allowance of $23 per month to $18 per month is *held*, upon the proof, not an abuse of discretion or manifestly unjust.**

APPEAL from an order of the circuit court for Outagamie county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

For the appellant the cause was submitted on the brief of *J. E. Malone.* He cited *Bacon v. Bacon,* 43 Wis. 197, 208; *Palica v. Palica,* 114 Wis. 236, 240; 14 Cyc. 786; *Smith v. Smith,* 139 Mich. 133; *State ex rel. Brown v. Brown,* 31 Wash. 397, 62 L. R. A. 974.

For the respondent there was a brief by *Giles Putnam,* attorney, and *Rubin & Lehr* and *Horace B. Walmsley,* of counsel, and oral argument by *Mr. Walmsley.*

VINJE, J. On the 8th day of August, 1908, a judgment of divorce was granted to the plaintiff from the defendant, wherein, pursuant to a stipulation between the parties, it was adjudged that the defendant should pay the sum of $23 per month to plaintiff for her support and that of their infant child, about five years of age. She was also given the household furniture. At the time of the divorce the defendant, who was a railroad conductor, was earning from $100 to $150 per month. Afterward the defendant obtained an order to show cause why the provision in the judgment relating to alimony should not be modified by requiring a less sum to be paid. The defendant, in the affidavit upon which the motion was based, alleged that he remarried; that he owned no property whatever; that he was thirty-five years old, a railroad

conductor, and had not for the last two years earned to exceed $97 per month; that he had to contribute to the support of his aged mother; and that, owing to the increased cost of living and the decrease in his earning capacity, the payment of the monthly sum of $23 was excessive. In opposition to this affidavit plaintiff alleged that her cost of living had increased; that she did not earn to exceed $8 per month as a seamstress, which was the vocation she followed; that she had incurred some expense to collect unpaid delinquent alimony; that she was thirty years old, but had been troubled somewhat by weak eyes which interfered greatly with her ability to sew; that the value of the household furniture over and above the incumbrance thereon did not exceed $200. She alleged further, upon information and belief, that the defendant was earning a sum exceeding $150 per month, and prayed that the amount of alimony be increased to $30 per month.

Upon substantially this proof the court entered an order modifying the allowance of alimony from $23 per month to $18 per month, and we are asked to reverse it. The amount to be allowed was a matter within the sound discretion of the trial court, and we cannot set aside the order unless there was an abuse of such discretion. The decision of the trial court in the allowance of alimony will not be disturbed unless manifestly unjust. *Hooper v. Hooper,* 102 Wis. 598, 600, 78 N. W. 753; *Van Trott v. Van Trott,* 118 Wis. 29, 94 N. W. 798. We are unable to say that there was any abuse of discretion or that the allowance made was manifestly unjust, and the order must therefore be affirmed.

By the Court.—Order affirmed.

ALLEN, Respondent, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

February 4—February 21, 1911.

Railroads: Fires negligently set: Combustibles on right of way: Defective engine: Questions for jury: Evidence: Measure of damages: Value of property destroyed: Purchase price: Witnesses: Credibility: False testimony.

1. Whether or not a fire which destroyed plaintiff's sawmill was caused by negligence of the defendant railway company in permitting its right of way to become incumbered with dry grass and other combustible material, which took fire from a passing engine, is *held* upon the evidence to have been a question for the jury.
2. Evidence that on previous occasions the engine of a freight train had thrown sparks or coals upon the right of way was not evidence that the engine of such train threw sparks on the day in question, in the absence of any showing that it was the same engine.
3. The value which measures the damages recoverable for wrongful destruction of property is the reasonable or market value, which means simply that reasonable sum which the property would probably bring on a fair sale by a man willing but not obliged to sell to a man willing but not obliged to purchase.
4. In the case of property not frequently bought or sold, for which there may be said to be no market, the rules governing the admission of evidence of value are somewhat elastic, and something must be left to the discretion of the trial judge.
5. In such a case the price paid for the property may be shown if the purchase was made shortly before the loss; but where, as in this case, it appears that the greater part of the property had been purchased four years before and had been through one fire, evidence of the purchase price is not admissible.
6. False testimony given by a witness as to a material fact must have been wilfully false in order to justify rejection of his other testimony not corroborated by credible evidence.

APPEAL from a judgment of the circuit court for Florence county: JOHN GOODLAND, Circuit Judge. *Reversed.*

William G. Wheeler, for the appellant.

W. B. Quinlan, for the respondent.

WINSLOW, C. J. The plaintiff sued for the value of a portable sawmill and appurtenances which on September 21, 1908, were destroyed by a fire alleged to have been negligently set by the defendant. There was a general verdict for the plaintiff, assessing his damages at $2,000, and from judgment thereon the defendant appeals.

There were two grounds of negligence alleged: *first,* that the right of way was allowed to become incumbered with dry grass and other combustible material which took fire from a passing engine; and, *second,* that the engine itself had no proper appliances for preventing the escape of sparks.

The contention is made that there was no sufficient evidence to go to the jury in support of either ground of negligence.

The evidence shows that the railroad track at the point in question is straight and runs nearly east and west, but somewhat north of west. The plaintiff's sawmill outfit was located on the bank of a small lake on premises immediately south of the right of way, and was unoccupied at the time of the fire. There is a steep up-grade as the track goes westward. A witness who lives about a mile west of the mill testified that a few minutes after the passage to the west of the regular way freight train, at about 1 o'clock on the day of the fire, he looked from his place down the track to the east and saw a fire starting in the vicinity of the mill which seemed to be on the right of way, and that in about an hour and a half he saw thick smoke which appeared to be over the lake. There was testimony also that the wind was in the northwest on the afternoon in question. There was also evidence by the plaintiff himself that he examined the surrounding territory on the following day and found no traces of fire leading to the property except from the northwest, and there he found the surface of the ground burnt over from a point inside of the right of way and adjoining the track without interruption in a southeasterly direction down to the place where the mill was situated. While the evidence was somewhat meager on

the question we are unable to say that there was no evidence to go to the jury.

On the second question, however, we think the appellant's contention must be sustained. Two witnesses gave evidence to the effect that previous to the day in question they had several times seen large sparks or coals on the right of way after the passage of the way freight train in question, but both witnesses testified that they could not identify the locomotive and were unable to say that the locomotive which hauled the train on the day in question was the same which had hauled the train on the days when they saw the coals. There was no other evidence on the point. If negligent construction or repair of an engine is proposed to be shown by the fact that large coals were thrown, it is of course a *sine qua non* that there be evidence identifying the engine which is alleged to be out of repair with the engine which threw the sparks. Proof that one engine threw sparks on one occasion is not proof that another engine threw sparks on an entirely different occasion.

The jury found the value of the property destroyed to have been $2,000. The only evidence on the subject, except as to some minor items of lumber, etc., on hand, was the evidence of the plaintiff, who gave a list of the items of property destroyed with the amounts which he paid for the articles when they were new. The sums on this list aggregated $2,478. The machinery had been in use four years. The engine and boiler were not new when bought, and they had been through one fire, together with the iron work, the carriage, husk, and shafting. The mill had not been running for more than a year.

It is very evident to our minds that the value fixed by the jury is excessive and that the jury had no evidence before them upon which any satisfactory estimate of value could be made. The value which the law gives is reasonable value, or, as it is sometimes called, market value. This does not mean

that there must be a market at hand where the property could be presently taken and sold, but simply that reasonable sum which the property would bring on a fair sale when sold by a man willing but not obliged to sell to a man willing but not obliged to buy. This is doubtless difficult to ascertain with regard to property of the character of the property in question, *i. e.* property not frequently bought or sold, situated at a considerable distance from any city or town. Where the question concerns staple commodities or property for which there is a regular and constant demand, the market price at the place where it was situated when destroyed is ordinarily the proper and perhaps the exclusive measure of the value. But where there is no such market, then the market price at other places, with the cost of transportation or other facts which will enable the jury to form a judgment as to the value at the place in question, may be given. In case of property for which there is no market even at other places the testimony is allowed to take a yet wider range, and other sales of similar property under similar circumstances at or near the date may be shown, and doubtless opinions as to the reasonable value by witnesses who have had experience in buying and selling such property may be given in evidence. The price paid for the property may in such cases doubtless be properly admitted if the purchase was made shortly before the loss. 2 Sutherland, Damages (3d ed.) § 445 *et seq.* The rules are somewhat elastic in this later class of cases and necessarily something must be left to the discretion of the trial judge. But in a case where it appears that the greater portion of the property had been purchased four years before and had been through one fire, we cannot consider evidence of the purchase price as properly admissible.

We call attention to an inaccurate expression in the charge which, while not excepted to, should be guarded against upon another trial. The court charged that if the jury found that any witness had testified falsely to any material fact his entire testimony, except such part as was corroborated by other

credible evidence, might be rejected. The rule does not go so far as this. The witness must have *wilfully* given false testimony as to some material fact in order to justify the rejection of his other evidence.

By the Court.—Judgment reversed, and action remanded for a new trial.

BARNES, J., took no part.

ST. CROIX CONSOLIDATED COPPER COMPANY, Respondent, vs. MUSSER-SAUNTRY LAND, LOGGING & MANUFACTURING COMPANY and another, Appellants.

February 4—February 21, 1911.

Nuisances: Abatement: Pleading: Sufficiency of complaint: Alleging ownership of land.

1. Sec. 3180, Stats. (1898), relating to actions to recover damages for and to abate private nuisances, is substantially a declaration of the unwritten law, with added features and simplification of procedure.
2. Upon a demurrer to the complaint it is immaterial whether the pleader intended to state a cause of action in equity or one at law, the sole question being whether sufficient facts are stated to entitle plaintiff to some relief against defendant within the competency of the court to grant.
3. In an action to recover damages for injury to lands through the flooding thereof by means of a dam and to abate the nuisance, a complaint alleging plaintiff's present ownership of the lands and that by the operation of the dam during the past three years he has suffered damage, is *held* to allege inferentially his ownership during the period in question and to be sufficient in that particular, though not expressly alleging such ownership.

APPEAL from an order of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Affirmed.*

Action to recover damages caused by unlawful flooding of plaintiff's lands.

Plaintiff, in form, stated several causes of action relating to as many alleged unlawful dams. One claim is an exact type of all. It may be thus briefly stated:

The defendant *Musser-Sauntry Land, Logging & Manufacturing Company,* without legislative authority, constructed a dam across a navigable stream in this state (specifying the stream), and is now the owner thereof. Defendant *St. Croix Timber Company* has operated such dam for more than three years and, in concert with its codefendant, threatens to and will continue to do as heretofore, unless prevented by judicial restraint. The dam is maintained and operated for controlling the flow of the stream by accumulating a large quantity of water and then opening the gates and emptying the pond. The result is that when the volume of water is augmented above the dam as aforesaid it overflows the banks of the stream onto lands owned by plaintiff, specifying the same, carrying *débris* thereon to its damage; and when the flow of water below the dam is augmented as aforesaid, it overflows the banks onto lands owned by plaintiff, specifying the same, depositing *débris* thereon, to its damage. By reason of the interferences with plaintiff's property, as stated, it has suffered damages in the sum of $1,000. The existence and operation of the dam is a nuisance.

Judgment was demanded for the several claims, an abatement of the alleged nuisances, and a temporary restraining order.

Defendants separately demurred to the complaint, *first,* for insufficiency; *second,* for improperly uniting causes of action.

The demurrers were overruled.

For the appellants there was a brief by *Luse, Powell & Luse,* and oral argument by *C. Z. Luse.*

For the respondent the cause was submitted on the brief of *Crownhart & Foley.*

MARSHALL, J. Counsel for appellants assume that whether the facts stated in the complaint constitute a cause of action

against either defendant must be tested by sec. 3180, Stats. (1898), and then argue that such facts do not answer the calls of such section for an action at law or a suit in equity. Without conceding that the statute is exclusive we may well say that it is substantially a declaration of the unwritten law with added features and simplification of procedure.

The first suggestion is that there is uncertainty in the complaint as to whether the pleader intended to state a cause of action in equity or one at law. That, of course, is not material. The sole question on a demurrer for insufficiency is, Does the pleading state facts sufficient to entitle the plaintiff to some judicial relief against the adverse party within the competency of the court to grant? In case of the purpose being to state a cause of action of one kind for which the facts related are insufficient though good for some other kind, and regardless of whether the prayer is appropriate to the latter, the complaint will nevertheless be proof against a general demurrer. Such is the broad spirit of the Code constructed to aid in administering justice with as much simplicity, certainty, economy, expedition, and with as little of penalizing of litigants for mistakes or negligence or ignorance of counsel, as practicable. However, very little, if anything, of the saving grace of the statute is necessary to sustain the pleading under consideration, as we shall see. It is brief, concise, and free from every feature of side-stepping from the mere statement of facts required by the Code.

It is argued that the complaint is not good for legal relief under sec. 3180, Stats. (1898), because it does not state, as to either cause of action, ownership of the land in respondent, except presently; does not allege that it was owner for any part of the period of three years during which the damages sought to be recovered are said to have occurred. It is considered otherwise. True, there is no express allegation in respect to the matter. It were better that there were one, but absence thereof is not vital. If ownership during the period the wrongs are said to have been done is alleged by

reasonable inference, that is sufficient on a general demurrer.

The allegation, "that by reason of the use and operation of said dam as aforesaid during the past three years, the plaintiff has suffered damage," etc., which is found in each cause of action, is reasonably pregnant with the assertion that during such three years plaintiff was in a situation with reference to the property to be thus damaged, in that he was the owner thereof. Looking at the allegation in the light of the pleading, as a whole, ownership of the land during the vital period is inferentially alleged.

It is suggested that the complaint does not state an equitable cause of action because it does not allege that the injury is irreparable, or the existence of circumstances within the calls of sec. 3180, Stats. (1898). In view of the foregoing such suggestion might be left undecided, but we will say in passing that no difficulty is perceived in respect to it. The section provides for use of the equitable remedy either in case the nuisance "may work an irreparable injury, interminable litigation, a multiplicity of actions, or either, or the injury is continuous and constantly recurring, or there is not an adequate remedy at law, or the injury is not susceptible of adequate compensation in damages at law." No argument seems necessary to point out that the facts alleged satisfy several of such essentials, either one of which is sufficient. In the very nature of things, the conduct complained of as threatened, in the light of the wrongs alleged, may occur and cause "interminable litigation or a multiplicity of actions" "or the injury be continuous or constantly recurring."

Some other suggestions are made in the briefs of counsel for appellants, all of which have received due consideration. Such other matters, however, do not appeal to us as being of sufficient moment to merit more than a passing notice.

By the Court.—The order is affirmed.

VINJE, J., took no part.

BRUHEIM, Appellant, vs. STRATTON, Respondent.

February 4—February 21, 1911.

Pleading: Complaint: Construction: Trespass or conversion? Surplusage: Amendment changing cause of action.

1. A complaint alleged trespass by defendant upon plaintiff's land in Minnesota, wilful and wrongful cutting of timber thereon, and wrongful conversion of the same. It also alleged value of the timber converted, set up a Minnesota statute giving treble damages for a wilful trespass, and demanded judgment for the actual damages and also for treble damages. *Held* that, regardless of the pleader's intention, a cause of action for conversion was sufficiently stated, and that the court should have treated as surplusage the allegations respecting a trespass of which it had no jurisdiction.
2. It was within the power of the court to allow such a complaint to be amended by setting out the conversion more definitely, even if the cause of action were thereby changed from trespass to conversion.

BARNES, J., dissents.

APPEAL from a judgment of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Affirmed.*

This action was brought to recover for timber cut on land in Minnesota and for treble damages under the Minnesota statute. The court sustained an objection to any evidence under the complaint, and denied a motion to amend the complaint by increasing the *ad damnum* clause and pleading the common law of Minnesota as to measure of damages in actions for conversion and to withdraw allegations as to treble damages. The court denied motion to amend for want of power and ordered judgment dismissing the action. Judgment was entered accordingly dismissing the action with costs, from which this appeal was taken.

Victor Linley, for the appellant.

For the respondent there was a brief by *Luse, Powell & Luse,* and oral argument by *C. Z. Luse.*

KERWIN, J. The complaint in this action stated that the plaintiff was the owner of certain lands in Minnesota and that between November, 1903, and March, 1904, the defendant unlawfully and wrongfully entered upon said land and without authority wilfully and wrongfully cut standing live timber growing thereon and wilfully and wrongfully took and carried the same away and converted the same to his own use, to the great injury and damage of the plaintiff, and further alleged the value of said timber converted, and demanded judgment for that amount and also treble said amount as damages under the Minnesota statutes. The complaint also contains allegations setting up the statutes of Minnesota respecting wilful trespass and single and treble damages. The defendant answered admitting that the Minnesota statutes set up in the complaint were in full force and effect in the state of Minnesota as alleged in the complaint, and denied every other allegation of the complaint.

The court below sustained an objection to any evidence under the complaint for the reason that it was a complaint in trespass upon lands in Minnesota, therefore the court had no jurisdiction of the action, and denied the application of the plaintiff to amend the complaint on the ground that it had no power or jurisdiction to allow such amendment, for the reason that, the cause of action being one in trespass, the complaint could not be amended so as to set up a cause of action for conversion of the timber cut.

We think the court below erred in both particulars. In the first place there were sufficient allegations in the complaint to make a good cause of action in conversion, and what the idea of the pleader was when he drew the complaint was immaterial. If the allegations were sufficient to constitute a cause of action in conversion the plaintiff was entitled to have it treated as such by the court, and the fact that the court had no jurisdiction of the action of trespass upon the land in another state rendered the allegations respecting a cause of

action in trespass merely surplusage, and, there being sufficient allegations aside from these to make the complaint one in conversion, it should have been so treated by the court. *Swift v. James*, 50 Wis. 540, 7 N. W. 656; *Bieri v. Fonger*, 139 Wis. 150, 120 N. W. 862; *Morse v. Gilman*, 16 Wis. 504; *Manning v. School Dist.* 124 Wis. 84, 102 N. W. 356; *Franey v. Warner*, 96 Wis. 222, 71 N. W. 81; *Emerson v. Nash*, 124 Wis. 369, 102 N. W. 921. Doubtless the complaint as originally drawn would have been subject to a motion to make more definite and certain or to strike out the surplus allegations, but no such motion was made and defendant answered on the merits. *Hagenah v. Geffert*, 73 Wis. 636, 41 N. W. 967; *Phillips v. Carver*, 99 Wis. 561, 75 N. W. 432.

Respondent relies upon *Joseph Dessert L. Co. v. Wadleigh*, 103 Wis. 318, 79 N. W. 237. It will be observed, however, that was an action brought for trespass upon land in Wisconsin, which action the court had jurisdiction of. Moreover the strict rule laid down there has not been followed by this court. In *Bieri v. Fonger, supra*, the court said (page 155):

"In the light of the very liberal rules for testing the sufficiency of pleadings and proceedings which have been declared in recent years and the progressive tendency to broaden the judicial vision as to the scope of sec. 2829, Stats. (1898), aforesaid, the criticism in *Joseph Dessert L. Co. v. Wadleigh, supra*, would hardly be made today. The general spirit of the decision as regards essentiality of technical accuracy in pleadings and necessity for a party to stand or fall, under all circumstances, by the particular cause of action he intended to plead, is not in strict harmony with the later-day expressions and decisions."

It was also within the power of the court to allow the amendment which plaintiff asked, setting out the conversion more definitely. The cause of action set up in the complaint was a tort action, whether for trespass or conversion, and the power of the court to change from a cause of action in tres-

pass to one in conversion, we think is clear. It follows that the court erred in sustaining the objection to any evidence under the complaint and also in refusing the amendment.

By the Court.—The judgment below is reversed, and the cause remanded for further proceedings according to law.

BARNES, J. (*dissenting*). The main purpose of a complaint in an action is to advise the defendant of the nature of the cause of action against him. In an action for trespass for cutting timber, where the trespasser reduces the logs to possession and converts the same to his own use, it is entirely appropriate to allege in a complaint in an action brought to recover damages for the trespass that the trespasser has so converted the timber, because under the statute (sec. 4269, Stats. 1898) the plaintiff is entitled to recover the highest market value of the timber cut while in the possession of the trespasser. These allegations relating to conversion which form the basis for the enhanced damages which plaintiff expects to recover might in themselves set forth sufficient facts to constitute a cause of action for conversion. But in an action for conversion the allegations of wrongful entry and of wrongful cutting are entirely inappropriate. A defendant is entitled to know whether he is being charged with a trespass on real estate or with a conversion of personal property. The complaint in the action before us could not be made the subject of a motion to make it more definite and certain or to compel the plaintiff to elect as to which of two causes of action he would rely upon, because it contained the necessary averments to constitute a cause of action in trespass with no unnecessary or redundant allegations in reference to such a cause. The original complaint, the first amended complaint, and the proposed amendments to the first amended complaint, all clearly stated a cause of action in trespass. The pleader intended to set forth such a cause, not only because a cause of action in trespass was stated, but because plaintiff claimed

the benefit of a statute and of decisions of Minnesota applicable to actions for trespass for cutting timber, by which his damages were enhanced largely beyond the actual injury sustained. The complaint is precisely such a complaint as this court held, in *Joseph Dessert L. Co. v. Wadleigh,* 103 Wis. 318, 79 N. W. 237, stated a cause of action in trespass and did not state a cause of action for conversion, and it is just such a complaint as the court again held, in *Grunert v. Brown,* 119 Wis. 126, 95 N. W. 959, stated a cause of action in trespass and did not state a cause of action for conversion. Some of the discussion in the *Dessert L. Co. Case* was not approved in *Bieri v. Fonger,* 139 Wis. 150, 120 N. W. 862, but the court expressly stated that the criticism indulged in did "not impair the decision of that case but only softens somewhat the logic of the discussion." See, further, *Klipstein v. Raschein,* 117 Wis. 248, 94 N. W. 63. So we have at least three comparatively late cases decided in this court passing upon the precise point involved which expressly sustain the view adopted by the trial judge and none to the contrary. It has been suggested that because our courts could not grant relief for a trespass committed on lands in the state of Minnesota the complaint should have been construed as intending to state a cause of action in conversion. This argument is no more persuasive than a like argument was in *Grunert v. Brown, supra,* where the plaintiff was remediless in trespass because the right of action was barred by the statute of limitations, whereas the statute had not run on a cause of action for conversion, if one were stated.

The trial court exercised its discretion to refuse to permit an amendment on the trial changing the cause of action from trespass to conversion. At the time the amendment was sought to be made, it appeared from the face of the proposed amended complaint that the cause of action for conversion was barred by the statute of limitations, although such was not the case when the summons was served in the trespass

action. Under these circumstances, under the decisions of this court, it would have been error to permit the amendment. *Meinshausen v. A. Gettelman B. Co.* 133 Wis. 95, 113 N. W. 408; *O'Connor v. C. & N. W. R. Co.* 92 Wis. 612, 66 N. W. 795. If this were not so, it would have been an abuse of discretion to deny the amendment. *Miller v. Kenosha E. R. Co.* 135 Wis. 68, 115 N. W. 355, and cases cited. Sec. 2830, Stats. (1898), permits an amendment only where it does not "change substantially the claim" of a party. As I understand the record, the trial court did not hold that it was without power to grant the amendment. It held that its jurisdiction should not be exercised under the facts before it.

VINJE, J., took no part.

HANNA, Respondent, vs. KELSEY REALTY COMPANY, imp., Appellant.

February 4—February 21, 1911.

Foreign corporations: Right to acquire property: Conveyance "wholly void:" Recording acts: Estoppel: Mortgages.

1. A conveyance of land in this state to a foreign corporation which has not complied with sec. 1770*b*, Stats. (1898), is not merely voidable at the election of the state, but is absolutely void and a nullity; and any party in interest may take advantage of that fact.
2. A foreign corporation which has no right to acquire property in this state cannot have the benefit of our recording statute (sec. 2241, Stats. 1898); and although a mortgage was unrecorded, the failure or delay of the mortgagee to take steps to give notice of his rights to persons who might purchase the land does not estop him to assert the invalidity of a conveyance to a foreign corporation which had not, at the time of such conveyance, complied with sec. 1770*b*, Stats. (1898).

APPEAL from a judgment of the circuit court for Polk county: A. J. VINJE, Circuit Judge. *Affirmed.*

The plaintiff was the owner of several parcels of land in Polk county on the 8th day of April, 1908, which lands were incumbered by a mortgage on which there was due the sum of $3,100. Prior to said date the plaintiff and the defendant Johnson entered into a verbal agreement by which plaintiff agreed to convey by warranty deed to said Johnson, subject to said mortgage, the lands referred to. Said Johnson agreed to execute a mortgage back to the plaintiff for the sum of $3,450 to secure his note, which was to be taken as part payment for the purchase price of said lands. Johnson also agreed to convey to the plaintiff certain real estate in St. Cloud, Minnesota. Pursuant to such agreement the plaintiff and his wife executed a deed of the Polk county property to Johnson, and Johnson executed a mortgage to the plaintiff covering the same property and also a deed of the St. Cloud property. The conveyances were delivered on the 8th day of April, and immediately thereafter Johnson requested the plaintiff to permit him to examine the note and mortgage which he had given to plaintiff. The mortgage was handed to Johnson, who thereupon said that there were some back taxes against the lands conveyed and that he would hold the note and mortgage until such time as they were paid. It was thereupon agreed between the parties that Johnson should hold the mortgage until the taxes were taken care of, and that neither the deed nor the mortgage should in the meantime be placed on record. The plaintiff at various times demanded the surrender of the mortgage and of the note which was given to secure such mortgage, which demands were refused, Johnson endeavoring to induce the plaintiff to take in lieu thereof some corporate stock of small or uncertain value which he owned. In the meantime Johnson recorded his deed and conveyed the lands to one Bart. J. Goodwin of Minneapolis, the name of the grantee in the deed being left blank. There-

after Goodwin inserted the name of one Maggie M. Finlay as grantee, and on August 26, 1908, recorded the deed in the office of the register of deeds of Polk county. No consideration was paid by said Maggie M. Finlay for the deed, she permitting her name to be used as grantee therein at the request of Goodwin. The court found on sufficient evidence that Goodwin was not a purchaser in good faith, but took the title with full knowledge of the fraud that Johnson was attempting to perpetrate upon the plaintiff. Thereafter Goodwin sold the lands to the defendant, the *Kelsey Realty Company,* a corporation organized under the laws of the state of Minnesota and authorized by its articles of incorporation to deal in real property, and caused the lands to be deeded to that company by Maggie M. Finlay. The court found that the *Kelsey Realty Company* was a purchaser in good faith for a valuable consideration, but that said corporation failed to comply with the provisions of sec. 1770*b,* Stats. (1898), and that it was not authorized or licensed to transact any business in Wisconsin prior to October 26, 1909. The deed to the *Kelsey Realty Company* was dated September 7, 1908, and was delivered on September 16 and recorded October 9, 1908, in the office of the register of deeds of Polk county. The plaintiff did not learn that the deed from Johnson to Finlay had been placed on record or that any other transactions in reference to the land had taken place until September 25, 1908, and on the 29th day of that month he tendered to Johnson all taxes due against the same and demanded the note and mortgage, which Johnson refused to deliver and which he had in fact destroyed during the month of August. The evidence tends to show that plaintiff knew that Johnson had placed the deed to him on record as early as April 28. The plaintiff commenced an action to enforce his lien for the sum of $3,450 and interest against the premises conveyed to Johnson, and to have the title of Johnson's grantee decreed to be subsequent and subject to his mortgage.

The summons and complaint in this action were filed in the office of the circuit court for Polk county on October 30, 1908, and notice of *lis pendens* was apparently filed on the same day. Maggie M. Finlay executed a quitclaim deed of the lands in controversy under date of November 6th to the *Kelsey Realty Company.* The circuit court found that the deed first executed to the *Kelsey Realty Company* was void because of the failure of that company to comply with the provisions of sec. 1770*b,* Stats. (1898), and that by the subsequent deed of November 6th the corporation acquired the interest of Johnson in said lands subject to the mortgage lien of the plaintiff. It was provided by the judgment that unless the *Kelsey Realty Company* should elect, on or before July 1, 1910, to pay to the plaintiff the sum of $3,450 with interest at six per cent. per annum from April 8, 1908, plaintiff might apply to the court for an order for foreclosure of plaintiff's lien upon the property. From a judgment entered in pursuance of the order of the court defendant prosecutes this appeal.

For the appellant there was a brief signed by *Frank B. Dorothy,* attorney, and *W. N. M. Crawford,* of counsel, and oral argument by *Mr. Dorothy.*

For the respondent there was a brief by *Morris E. Yager* and *Walter L. Chapin,* and oral argument by *Mr. Chapin.*

Barnes, J. It is urged by the appellant (1) that the court was in error in holding that the *Kelsey Realty Company* acquired no title to the lands involved because sec. 1770*b* of our statutes (Stats. 1898) had not been complied with; and (2) that the plaintiff is estopped from setting up any such defense to the action. Some other errors are assigned, but the contentions of the appellant in reference thereto are either untenable or immaterial in view of the conclusion reached, and they will not be discussed.

The appellant was a foreign corporation amenable to the

provisions of sec. 1770*b*, provided it saw fit to extend its activities to the state of Wisconsin and to do any of the things which such corporations are forbidden to do without compliance with the statute. By subd. 2 of the law it is provided that no foreign corporation "shall transact business or acquire, hold or dispose of property" in the state unless it shall have first complied with the requirements of the statute, and by subd. 10 of the law every contract relating to property within this state before compliance with the requirements of the law is declared to be "wholly void" on the part of the corporation making it. It must be conceded that the appellant attempted to acquire property within the state and did so, unless the statute we are considering provides otherwise, and that there was no element of interstate commerce involved in the transaction which takes it outside of the statute. The claim of the appellant is that the statute does not render the transaction void, but voidable only at the election of the state, and that the state only can question the validity of its title and decree a forfeiture.

In support of his contention counsel for appellant invites our attention to a number of cases, which for convenience may be divided into three classes. The first class comprehends those wherein it is held that although aliens are disabled by the common law from acquiring, owning, or holding real estate within a state, yet if an alien does acquire property by grant or descent the transaction is not void, but is voidable only at the election of the state. Such were the cases of *Craig v. Radford,* 3 Wheat. 594, 599; *Governeur's Heirs v. Robertson,* 11 Wheat. 332, 351, as well as other cases that might be cited. The second class comprehends those cases where a corporation acquires real estate without being authorized so to do by its charter or its articles of incorporation and where, therefore, its act in this behalf is *ultra vires.* In such a situation it is generally held that the right, at least of a foreign corporation, to hold property can only be questioned

by persons directly interested in the corporation or by the state whose charter and franchises are being exceeded or abused. Such was the holding in *Ill. S. Co. v. Warras,* 141 Wis. 119, 123 N. W. 656, and in the cases cited on page 126 of the opinion. To the same effect is *Cowell v. Springs Co.* 100 U. S. 55, 60. It should be noted, however, that the rule in *Ill. S. Co. v. Warras* is expressly limited to cases where there is no statutory prohibition against the holding of the property involved. The third class of cases pertains generally to statutes akin to our sec. 1770*b,* although in most instances differing therefrom in some respects. Some courts hold that under such a statute the conveyance is voidable only at the election of the state. It was so held in *Carlow v. C. Aultman & Co.* 28 Neb. 672, 44 N. W. 873, and in *Reed v. Todd* (S. Dak.) 127 N. W. 527, two of the five judges dissenting; also in *Hickory Farm Oil Co. v. B., N. Y. & P. R. Co.* 32 Fed. 22. The case of *McKinley-Lanning L. & T. Co. v. Gordon,* 113 Iowa, 481, 85 N. W. 816, can hardly be said to be authority on the proposition, as the suit involved a contract relating to Nebraska real estate and the Iowa court construed the contract in accordance with the law of Nebraska as announced in *Carlow v. C. Aultman & Co., supra.*

Other courts have held that, where there is a valid statute expressly prohibiting a corporation from acquiring real estate and declaring any conveyance made in defiance of the law to be void, such a conveyance should not be held voidable merely, and that any party in interest might take the benefit of the statute. Such was the conclusion of the New York court in the elaborately considered case entitled *Estate of McGraw,* 111 N. Y. 66, 96, 19 N. E. 233, which decision was affirmed on appeal to the supreme court of the United States, although the decision of that court is not particularly valuable, inasmuch as it followed the construction of the New York statutes placed thereon by its court of appeals. Other cases where the view of the New York court is upheld

are *Wunderle v. Wunderle,* 144 Ill. 40, 64, 33 N. E. 195; *Hanchey v. Southern H. B. & L. Asso.* 140 Ala. 245, 37 South. 272. The same doctrine by inference is found in *Chicago T. & T. Co. v. Bashford,* 120 Wis. 281, 97 N. W. 940, although that case did not necessarily involve a decision of the question.

The New York court differentiates between an act of a corporation which is merely *ultra vires* and one which is in contravention of a positive statute, holding that, while the former may be voidable merely at the election of the state, the other is void and may be taken advantage of by any party in interest.

This court has had before it a number of cases arising out of business transactions by foreign corporations in the state where the statute had not been complied with, as well as cases involving contracts made in the state by such corporations, and has uniformly held that parties in interest might assert the benefit of the statute. See *International T. Co. v. Peterson,* 133 Wis. 302, 113 N. W. 730; *Southwestern S. Co. v. Stephens,* 139 Wis. 616, 626, 120 N. W. 408; *Duluth M. Co. v. Clancy,* 139 Wis. 189, 120 N. W. 854; *Ashland L. Co. v. Detroit S. Co.* 114 Wis. 66, 89 N. W. 904.

No good reason suggests itself why a party who is affected by a foreign corporation doing business or making a contract in the state in violation of the statute may take advantage of it, while one who is affected by the corporation acquiring or holding property may not do so. All these prohibitions occur in the same sentence in the statute and the penalty is precisely the same as to the violation of each of them.

But more convincing is the fact that this court has unequivocally held that the words "wholly void" as used in the statute "mean just what they say," and that is, "absolutely void and a nullity." *Ashland L. Co. v. Detroit S. Co., supra.* In adopting such construction the court followed the decision in *Land, L. & L. Co. v. McIntyre,* 100 Wis. 245, 75 N. W. 964,

wherein the word "void" as used in sec. 692, R. S. 1878, was given a like construction. So, unless we overrule our former decisions, it naturally follows that we cannot adopt for our guidance the pronouncements of courts that elect to construe the word "void" as meaning simply "voidable" in such a statute. It therefore appears that the real question in issue has already been decided, as it would hardly be contended that if the deed to the appellant was "absolutely void and a mere nullity" the plaintiff could not show that fact and take the benefit of it. If its deed was void the appellant took nothing under it and has no right or title to assert by virtue of such deed.

The statute is in fact plain and unambiguous on the question we are considering and leaves little room for construction. Drastic and harsh in its penalties it may be, but the legislature undoubtedly knew that cases involving great hardships might arise because of the statute. The state evidently intended to make the consequences of violating the law so great as to enforce obedience to it. It was within the legislative province to prescribe those penalties and this court cannot soften or mitigate them without violating the law. *Ashland L. Co. v. Detroit S. Co., supra,* and cases cited on page 78. If the construction contended for by the appellant should prevail, the statute in so far as it relates to the acquiring or holding of property in this state would be practically nullified. Even if the state should attempt to assert its right it might be utterly impossible for it to get any service upon the foreign corporation so as to commence any action or proceeding in the courts of this state. It is no great hardship in the present case to hold that the appellant must comply with sec. 1770*b* before it can take the benefit of our recording statute, sec. 2241, Stats. (1898), under and by virtue of which it claims priority over the plaintiff. We hold, therefore, that the conveyance first made to the appellant was not simply voidable, but was void, and that the plaintiff may show that

fact and take the benefit and advantage of it. The ground of estoppel relied on is failure on the part of the plaintiff to take the necessary steps to apprise parties of his rights who might be induced to purchase the real estate. There is no claim that the plaintiff ever had any communication with the appellant in reference to the lands, directly or indirectly, or even that he knew of the corporation. Inasmuch as the appellant could not lawfully acquire the lands until it had complied with the law, and the transaction by which they were acquired was void, the plaintiff did not owe to the appellant the duty of more promptly beginning his action and filing a notice of *lis pendens*. Constructive notice is intended to protect innocent parties who are about to engage in lawful transactions.

By the Court.—Judgment affirmed.

VINJE, J., took no part.

SMITH, Respondent, vs. PETERSON, Appellant.

February 4—February 21, 1911.

Appeal: Verdict, when disturbed.

A verdict will not be disturbed on appeal for lack of evidence if there is any credible evidence to support it.

APPEAL from a judgment of the circuit court for Polk county: A. J. VINJE, Circuit Judge. *Affirmed.*

Frank B. Dorothy, for the appellant.

For the respondent there was a brief by *Morris E. Yager,* and oral argument by *E. J. Brabant.*

TIMLIN, J. The plaintiff had verdict and judgment for $139.95 in an action on contract, and the appellant's claim is

that there is no evidence to support the verdict as respects $100 of this amount, because that item represented the purchase of a United States cream separator by the defendant and there was a warranty that the separator would do good and satisfactory work, which the separator did not do. This machine was sold and delivered on June 24, 1904, and defendant produced evidence to show that the machine was used about two months thereafter and that it did not separate properly. He complained to the seller, who attempted to adjust it, and sent a new bowl and made other adjustments which failed of their object. After notice to the seller he kept it about two years without using it. On the other hand the plaintiff offered evidence tending to show that after the adjustment mentioned the machine worked properly, and the buyer made no further complaint to him until about the time this action was commenced in justice's court in 1907 or 1908.

A witness on the part of the plaintiff testified that in different conversations during the year and a half immediately succeeding the purchase the buyer said to him that the separator ran all right. Another that he worked for the buyer, beginning three months after the purchase of the separator and continuing six months, and operated this separator and never found any fault with it, and that the buyer operated it and never made any complaint to him during that time. Another that some two years or more after the purchase he borrowed the separator from the buyer for about fifteen days, used it at this time, and that it worked all right, except that it did not skim milk clean every time; that it ran hard and was rusty, because it had been standing out on the buyer's porch. There was considerable evidence tending to impeach the credibility of the testimony last mentioned. A motion for a new trial was denied by the circuit court. The court instructed the jury:

"If you are satisfied from the preponderance of the evidence and to a reasonable certainty that the machine was

warranted, that it failed to comply with such warranty, and that for that reason the defendant never accepted the machine unconditionally as his own, and so notified plaintiff within a reasonable time, then you will find for the defendant, otherwise you will find for the plaintiff."

It is the law of this state that a verdict is not to be overthrown as unsupported by evidence if there is any credible evidence to support the verdict. *Sedlack v. State,* 141 Wis. 589, 124 N. W. 510; *Estey Organ Co. v. Lehman,* 132 Wis. 144, 111 N. W. 1097.

By the Court.—Judgment affirmed.

VINJE, J., took no part.

DULUTH LOG COMPANY, Appellant, vs. ST. CROIX LAND COMPANY, Respondent.

February 4—February 21, 1911.

Replevin: Logs and timber: Consent to cutting: Estoppel.

In an action of replevin for timber, the holding of the trial court is sustained, to the effect that there was no evidence of consent by defendant to the cutting of timber from its land or of facts which would estop defendant from claiming that no consent was given.

APPEAL from a judgment of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Affirmed.*

The cause was submitted for the appellant on the brief of *Archibald McKay,* and for the respondent on that of *George C. Cooper.*

WINSLOW, C. J. The plaintiff brought replevin for a quantity of logs, poles, etc., cut and lying upon two eighty-acre tracts of land. The defendant owned the lands on which

the logs and poles were piled and from which they were cut and also claimed to own the logs and poles themselves. A verdict for the defendant was directed by the court, and from judgment thereon the plaintiff appeals.

The plaintiff claimed title to the property by purchase from two men named Curtis and Henderson, who were in possession of the two eighties respectively from November, 1905, until September, 1906, and in fact cut the timber and sold it to the plaintiff in the summer of 1906. These men were in possession of their respective parcels as prospective purchasers, Henderson under a written option to purchase at $8.50 per acre in certain fixed instalments, and Curtis under an oral arrangement to pay $9 per acre therefor, the times of payment not being fixed. There was no written contract to convey in either case. It was admitted that Henderson was given permission to cut some timber in the winter of 1905 and 1906 and that he did so and sold and delivered the same. It is claimed that there was some evidence tending to show an implied consent on the part of the defendant that Henderson and Curtis might cut and sell the timber in question in the following summer, or at least that the defendant's officers knew of the cutting and did not object and are now estopped from claiming that there was no consent given. The trial judge held that there was no evidence of such consent, or of facts which would create an estoppel, and after careful examination of the evidence we cannot say that his conclusion was wrong.

By the Court.—Judgment affirmed.

VINJE, J., took no part.

NORTHERN PACIFIC RAILWAY COMPANY, Appellant, vs. DOUGLAS COUNTY and another, Respondents.

February 4—February 21, 1911.

Municipal corporations: Street improvements: Special assessments: Land "abutting or adjacent:" When appeal is exclusive remedy.

1. A law for charging, to some extent, the cost of improving that part of the roadway of a street directly in front of parcels of land abutting thereon, lying between the curb line and the center of such roadway, has reference only to the expense incurred within such boundaries.
2. A law authorizing improvement of a street at the expense in whole or in part of parcels of land abutting thereon or adjacent thereto, includes only parcels fronting on that part of the street improved or which adjoin such parcels and are adjacent to the street.
3. In such a law, nothing appearing clearly to the contrary, "abutting" and "adjacent" are not used synonymously. The former contemplates the street boundary toward the lot as identical with the boundary of the latter toward the former, while the idea of the latter is, a parcel near by the street but separated therefrom by an intervening abutting strip or parcel.
4. A law providing that, in case of the owner of a parcel of land affected by a street improvement being aggrieved in any way by reason of any determination of the administrative body as to burdening such parcel on account of such improvement, his sole remedy shall be by appeal to the circuit court, is mandatory and exclusive, precluding jurisdiction being exercised in any other way in law or in equity as to any real estate within the calls of the statute.
5. In the foregoing the words "affected by the improvement" limit the remedy to such parcels of real estate as the administrative board dealing with the matter would have jurisdiction under any circumstances to affect thereby.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Reversed.*

Equitable action to restrain a sale of land for nonpayment of delinquent special taxes.

The issues presented for trial are indicated, in a general way, by the following summary of the findings: Proceedings were duly had under the charter of the city of Superior to determine the amounts respectively chargeable to various parcels of real estate abutting on or adjacent to that part of Winter street in said city it was proposed to pave, which portion included plaintiff's property. In such proceedings the amount was determined chargeable to said property challenged in this case. The assessing board acted within its discretion in including said property in the district benefited by the improvement. Such findings covered in a general way the subject of the litigation. Judgment was given in defendants' favor on the conclusion and order of the court following such findings.

For the appellant there was a brief by *Hanitch & Hartley,* attorneys, and *C. W. Bunn* and *M. T. Sanders,* of counsel, and oral argument by *Louis Hanitch.*

W. R. Foley, for the respondents.

MARSHALL, J. The findings do not disclose with reasonable definiteness the points litigated. The facts are that the city of Superior in due course,—if the land of appellant were chargeable under sec. 959—35, Stats. (1898), with any special tax because of the work on that part of Winter street improved,—imposed thereon the tax in question. The land abutted on Winter street, but not on that portion improved. Such portion did not reach nearer to appellant's land than about 350 feet. In view thereof counsel for appellant insisted, as appears, on the trial and do so now, that the land was improperly burdened because it did not abut on that portion of the street which was paved. The language of the section is as follows:

"No property fronting on any street or avenue shall be exempt from any assessment of benefits on account of the paving thereof with a permanent pavement having a concrete

foundation until such property shall have paid in the aggregate in assessments for street pavements in front thereof the sum of three dollars per square yard for all that part of the roadway directly in front of or abutting the same and lying between the curb line and the center of such roadway. Where any property has paid less than said amount it shall be held liable for any difference up to the amount of three dollars."

It is considered that the quoted language is too plain to warrant applying thereto rules for construction. The improvement was not directly in front of the parcel of land charged with the tax, nor even within the vicinity thereof. Therefore, the situation was entirely outside the calls of the statute.

Counsel for respondents insist that the tax is warranted by sec. 119 of the city charter (Laws of 1891, ch. 124), which reads as follows:

"Before any established grade shall be changed or any work shall be ordered done on any street, in whole or in part at the expense of the abutting or adjacent real estate, the board of public works shall view the premises and determine the damages and benefits which will accrue to each parcel of such real estate by such change or alteration of grade; the entire cost of the contemplated work or improvement upon the street, the benefits and damages that will accrue to the several parcels of such real estate by such work or improvement, and the amount that should be assessed under the provisions of this chapter, to each parcel of such real estate to be benefited, as benefits accruing thereto by such contemplated work or improvements."

Whether the quoted part of the chapter was modified by the law of 1893, before quoted as sec. 959—35 of the Statutes, need not, necessarily, be decided for this case, though we may well say, in passing, that no reason is perceived why the statute as to the particular matter therein dealt with did not supersede the charter.

Assuming the quoted provision of the charter to be in full force, we cannot perceive how it can save the tax in question. The language is quite plain. It contemplates im-

provement of streets, beneficial to parcels of real estate abutting on or adjacent thereto, such improvement being in front of such parcels, at the expense, in whole or in part thereof. That must be so else a parcel of land so circumstanced might be taxed over and over again for street improvements, which would be quite unreasonable.

It is also quite plain that "abutting" and "adjacent" were not used synonymously. One was to characterize any parcel of real estate having a street and lot line in common. The other was to characterize one not in part bounded by a street line.

"Adjacent" is sometimes used for touching on or bounded by; but strictly speaking it signifies, near to but not touching; "contiguous" is probably sometimes also used in the former sense and sometimes and more properly in the latter, while "adjoining" is really the proper term for in contact with, though each of such words is occasionally used in a perverted way. It will be found that they have been construed variously by courts according to circumstances. "Adjacent" and "contiguous" as well, used alone, have been held to mean touching at times, while generally they have been used probably in the proper sense in legislative enactments and it is cases of such use that the courts have dealt with. The following are illustrations: *Hennessy v. Douglas Co.* 99 Wis. 129, 74 N. W. 983; *People ex rel. Sackmann v. Keechler,* 194 Ill. 235, 62 N. E. 525; *Hanifen v. Armitage,* 117 Fed. 845, 851; *Hanover F. Ins. Co. v. Stoddard,* 52 Neb. 745, 73 N. W. 291; *McDonald v. Wilson,* 59 Ind. 54, 55; *Brooklyn Heights R. Co. v. Brooklyn,* 18 N. Y. Supp. 876, 877; *Kent v. Perkins,* 36 Ohio St. 639, 641.

In the statute under consideration, it seems, as an original question, that the word "adjacent" was used in the sense of near to and not abutting on the street. But the question is not new. This court in *Hennessy v. Douglas Co.* 99 Wis. 129, 136, 74 N. W. 983, said in respect to the particular char-

ter provision, "adjacent" signifies, in this connection, "lying near, close to, or contiguous, but not actually touching." "The distinction between 'adjacent' and 'adjoining' seems to be that the former implies that the two bodies are not widely separated, though they may not actually touch, while 'adjoining' indicates that they are so joined or united that no third body intervenes."

Thus it will be seen that the parcel of land in question cannot be both abutting and adjacent within the meaning of the statute. It cannot be adjacent because it actually touches, or in other words, abuts on the street. So it was of the latter kind. No part of the improvement was chargeable thereto because the improvement did not include any part of the street in front thereof. Doubtless the term "adjacent" was used to describe property separated a short distance from the street by intervening property abutting thereon, and dependable somewhat on the intervening strip.

It follows that the board of public works of the city of Superior plainly exceeded its powers by including the parcel of real estate in the assessment district for the particular Winter street improvement.

The foregoing, in view of the decision herewith in *Newton v. Superior,* 146 Wis. ——, 130 N. W. 242, suggests the question of whether the invalidity of the tax was legitimately questionable other than by appeal from the decision of the board of public works. It is considered that such question must be answered in the affirmative.

True, the wording of the law is very broad. Doubtless the remedy by appeal, as has been decided, was intended to be exclusive as to everything within its scope. But the difficulty in question was not so encompassed. That is quite plain. Sec. 126, ch. 124, Laws of 1891, governing the subject, is as follows:

"The appeal given by the last section from the report of the board of public works as confirmed by the common council,

shall be the only remedy of the owner of any parcel of land, or any person interested therein, affected by said improvement, for the redress of any grievance he may have by reason of the making of such improvements, or by reason of the change of any established grade covered by said report."

Note the language "any parcel of land . . . affected by said improvement." That does not mean any parcel of land upon which the board of public works may, whether acting within or without jurisdiction, choose to impose a burden; but any parcel in fact "affected by said improvement," in that, barring errors, it might be charged, not parcels which could not, under any circumstances, be burdened on account of the improvement. Otherwise the board in imposing such charges could include parcels of real estate on other streets or in a distant part of the city, or even outside the city, and the owners would have to resort for redress to the special remedy. Such a construction of the statute would be outside its letter and spirit and lead to absurd results.

It follows that the judgment must be reversed and the cause remanded with directions to render judgment in favor of the appellant in accordance with this opinion.

By the Court.—So ordered.

VINJE, J., took no part.

STATE EX REL. KUSTERMANN VS. BOARD OF STATE CANVASSERS.

February 6—February 21, 1911.

Elections: Representative in Congress: State canvass: When mandamus *lies: Duty of canvassers: Presumptions: Powers of supreme court: When exercised.*

[1. Whether, after the board of state canvassers has determined the result of an election, issued its certificate of election, and adjourned *sine die*, it can, by *mandamus* or otherwise, be compelled to reconvene and issue a certificate to another person, not determined.]

2. A board of county canvassers, in making return of the result of an election for representative in Congress, certified that a certain candidate had received 1,450 votes in the county, and appended a tabular exhibit (certifying that it was correct as compiled from the original returns made to the county clerk) in which the votes for said candidate in one precinct were entered as 16, but just to the right of such figures were the figures 22, followed by a brace and the words, "Shown on tally sheet. Inspectors' statement shows 16." Below the footing of the column, which was 1,444, the figure 6 was set down and added thereto, and the result, 1,450, was given thereunder. *Held*, that the board of state canvassers properly credited said candidate with 1,450 votes from that county, it being obvious on the face of the return that the county canvassers determined that the figures in question should be 22 and not 16.

3. It cannot be said by the court in such case that the county canvassers improperly made up the tabular exhibit; but, in the absence of evidence to the contrary, it must be presumed that they performed their duty and determined the correct vote in the manner provided by law.

4. The memorandum on the tabular statement, referring to the tally sheet, if evidence of anything, is not evidence that the board of county canvassers followed the tally sheet.

5. It is the duty of the board of state canvassers to canvass from the regular returns before them, and they cannot go behind the returns.

6. Whatever may be the power of the supreme court under sec. 3452, Stats. (1898),—which authorizes it in certain cases, upon *mandamus* against any board of canvassers, to inquire into the facts of the election, irrespective of the election returns, "if it is

deemed necessary to promote the ends of justice,"—such power will not be exercised in a case involving the election of a representative in Congress where a certificate of election has already been issued to one of the candidates and the inquiry could not be completed before his term of office would have begun, when, in any event, the ultimate decision of the right to the seat must rest with the House of Representatives itself.

THIS is an application for *mandamus* requiring the board of state canvassers to reconvene, determine and certify that *Gustav Kustermann,* petitioner, was elected as representative in Congress from the Ninth Congressional district of Wisconsin, and requiring the secretary of state to issue and transmit certificates of such election.

It appears from the petition that the petitioner, *Kustermann,* was the Republican candidate for Congress in the Ninth Congressional district at the general election held November 8, 1910; that Thomas F. Konop was the Democratic candidate, Alexander McEathron the Prohibition, and Thomas J. Oliver the Social Democratic candidates in said district; that said district is composed of the counties of Brown, Kewaunee, Door, Oconto, Marinette, and Outagamie; that the board of county canvassers canvassed the returns of said election in the respective counties made by the inspectors of the election of the several precincts and such returns were certified to the secretary of state. The petition alleges that the votes received by each of said candidates at such election were as follows:

	Kustermann.	Konop.	McEathron.	Oliver.
Brown county	2,797	3,274	128	679
Kewaunee county	893	2,326	12	22
Door county	1,303	738	58	91
Oconto county	1,725	1,444	39	174
Marinette county	2,039	842	169	614
Outagamie county	3,378	3,510	149	197
	12,135	12,134	555	1,777

That on November 28, 1910, the board of state canvassers met at the office of the secretary of state in Madison and canvassed the returns of said election; that the petitioner appeared before said state board as well as said Thomas F. Konop, each claiming to have the greatest number of votes cast in said district; that the board adjourned to December 5, 1910, and again to December 8, 1910, at which last named date, after the canvass of the returns, the board made a statement that said respective candidates received the following number of votes in said counties:

	Kustermann.	Konop.	McEathron.	Oliver.
Brown county	2,797	3,274	128	679
Kewaunee county	893	2,326	12	22
Door county	1,303	738	58	91
Oconto county	1,725	1,450	39	174
Marinette county	2,039	842	169	614
Outagamie county	3,378	3,510	149	197
	12,135	12,140	555	1,777

That said board of state canvassers in disregard of their duties certified said above statement as true and determined that Thomas F. Konop had been by the greatest number of votes elected, and made a certificate accordingly which was recorded in the office of the secretary of state, and transmitted to said Konop a certificate of election under the lesser seal; that in making said examination, canvass, statement, determination, and certificate the said board of state canvassers went behind the returns lawfully before said board and credited said Konop with six votes more than were cast for him in the first voting precinct in the town of Pensaukee, Oconto county.

The petition charges that, aside from the face of the returns, either through inadvertence, mistake, or fraud, divers omissions were made by the inspectors and clerks of election in counting, recording, certifying, and returning the votes, whereby the vote as counted, certified, and returned for pe-

titioner was smaller than was in fact cast for him, and sets forth divers irregularities in that regard, and that by reason of such omissions, errors, and mistakes in counting, canvassing, certifying, and returning said votes, and other errors, omissions, and mistakes on the part of the election officials, the votes received by petitioner had been incorrectly counted, certified, and returned.

An alternative writ of *mandamus* was issued and due return made thereto by the board of state canvassers, composed of *James A. Frear,* secretary of state, *Andrew H. Dahl,* state treasurer, and *Frank L. Gilbert,* attorney general. The return puts in issue the material allegations of the petition and writ and sets up affirmatively that as such board of state canvassers they duly met on November 28, 1910, and adjourned, and on December 8, 1910, duly canvassed the returns and made a statement of the whole number of votes cast for representative in Congress from the Ninth district and stated the whole number of votes to be 26,607, and that of said votes the whole number given to Konop was 12,140, and the whole number given to petitioner was 12,135, and to McEathron 555, and to Oliver 1,777, and distinguished the several counties in which such votes were given as follows:

Counties.	Total vote.	Thomas F. Konop.	Alexander McEathron.	Gustav Kustermann.	Thomas J. Oliver.
Brown	6,878	3,274	128	2,797	679
Kewaunee	3,253	2,326	12	893	22
Door	2,190	738	58	1,303	91
Outagamie	7,234	3,510	149	3,378	197
Oconto	3,388	1,450	39	1,725	174
Marinette	3,664	842	169	2,039	614
	26,607	12,140	555	12,135	1,777

That the respondents as such board duly certified such statement to be correct and determined that said Konop had been given the greatest number of votes and duly elected to the office aforesaid, and attached to such statement a certifi-

cate of their determination and delivered the same to the secretary of state as provided by law; that a majority of said board, namely, *James A. Frear,* secretary of state, and *A. H. Dahl,* state treasurer, signed said certificate, and *Frank L. Gilbert,* attorney general, dissented therefrom, and thereupon said board, having completed their work as provided by law, adjourned *sine die.* Respondents specifically deny that Thomas F. Konop received only 1,444 votes in Oconto county, and allege that said returns from Oconto county were duly canvassed by respondents, and that the whole number of votes given for representative in Congress for the Ninth Congressional district from Oconto county was 3,388, of which number Thomas F. Konop received 1,450, Alexander McEathron 39, Gustav Kustermann 1,725, and Thomas J. Oliver 174, as shown by the certified statement of the canvass made by the board of county canvassers of Oconto county, and from which certified statement respondents made their canvass and determination for said office as to Oconto county; that *James A. Frear* as secretary of state duly recorded in his office such certified statement and forthwith made and transmitted to Thomas F. Konop a certificate of his election under the lesser seal, and caused a copy of such certified statement to be published in a newspaper printed at the seat of government, and that said secretary of state also prepared a like certificate attested by him and addressed the same to the House of Representatives as required by law; that said Thomas F. Konop in truth and in fact received 12,140 votes, and that said number is shown by the returns from which said canvass was made, and that the petitioner received only 12,135 votes as shown by the returns. Respondents deny that in making the examination, canvass, statement, determination, and certificate they went behind the returns lawfully before them as such board and considered evidence *aliunde* and credited said Konop with six votes more than were cast for him in the first voting precinct in the town of Pensaukee, Oconto county; and

allege that at the time of making the canvass and determination the relator and also Thomas F. Konop appeared in person and by counsel; that relator and said Konop filed with the board by their respective attorneys, at the time of making said canvass, divers affidavits and statements, among which was a certified statement of the tally sheet and tabulated statement of the votes cast at said election for member of Congress in the first voting precinct of the town of Pensaukee, Oconto county, also affidavits of inspectors of the election of said precinct; that such statement and affidavits were permitted to be filed at the request of the parties with the understanding that the same would not be considered by the board and the same were not considered by the board in any manner whatever in making their determination and canvass, and that respondents considered nothing except the legal returns made from the different counties comprising said district. Respondents allege generally due performance of their duty and that they adjourned *sine die* on the 8th day of December, 1910, and that said Thomas F. Konop, to whom said certificate had been issued, is now in possession of the office to which he was so declared elected, and that his name now appears on the roll of the House of Representatives as member elect from the Ninth Congressional district of Wisconsin, of the Sixty-second Congress of the United States of America; that the respondent *Frank L. Gilbert* was of opinion upon the face of the returns that the certificate should issue to the relator, and that he has stood ready and willing to certify that the relator received the greatest number of votes and was duly elected representative in Congress.

The following were attached to and made a part of the return: A certified copy of certificate of the board of state canvassers, certified copy of the statement of the board of county canvassers, certificate of election, certified copy of inspectors' statement showing result of election held for first precinct, town of Pensaukee, Oconto county, certified copy of tally list

from first precinct of town of Pensaukee, Oconto county, and certified copy of affidavits of inspectors of election for first precinct of town of Pensaukee, Oconto county.

The petitioner demurred to the return of the board of state canvassers upon the ground that it appears upon the face thereof that the same does not state facts sufficient to constitute a defense and does not show any cause or excuse for not obeying said writ.

For the petitioner there was a brief by *Fairchild & Goldman* and *Greene, Fairchild, North & Parker,* attorneys, and *H. R. Goldman* and *Jerome R. North,* of counsel, and oral argument by *J. R. North* and *H. R. Goldman.* They contended, *inter alia,* that on the face of the returns it was the duty of the board of state canvassers to determine that the relator received a plurality of all the votes cast and that he was entitled to the certificate. The tally sheets cannot be considered. Only such papers as the statute requires may be regarded as election returns. *State ex rel. McDill v. Board of State Canvassers,* 36 Wis. 498, 507; McCrary, Elections (2d ed.) § 104, p. 119; 15 Cyc. 376, note 44; *Smith v. Lawrence,* 2 S. Dak. 185, 49 N. W. 7; *State ex rel. Steadley v. Stuckey,* 78 Mo. App. 533; *State ex rel. Ford v. Trigg,* 72 Mo. 365; *State ex rel. Sunderall v. McKenzie,* 10 N. Dak. 132, 86 N. W. 231; *People ex rel. Att'y Gen. v. Tool,* 35 Colo. 225, 86 Pac. 231. On the other hand, it has been held that where the tally sheets are made a part of the return by the statutes they can be considered by the canvassers, and where there is a discrepancy between them and the statements of the election officials the former prevail. *State ex rel. Welty v. McFadden,* 46 Neb. 668, 65 N. W. 800; *Hughes v. Parker,* 63 Kan. 297, 65 Pac. 265; *In re Stewart,* 155 N. Y. 545, 50 N. E. 51. The duties of canvassing boards are purely ministerial; they must canvass only from the legal returns before them and cannot consider evidence *aliunde. Att'y Gen. ex rel. Carpenter v. Ely,* 4 Wis. 420, 427. To

consider the tally sheets in this case would be to go behind the legal returns, and this the county canvassing board could not do. Sec. 94*e*, Stats. (1898); 15 Cyc. 381, 382, 385, and cases cited; 10 Am. & Eng. Ency. of Law (2d ed.) 746, 747; Merrill, Mandamus, §§ 178, 181; *Att'y Gen. ex rel. Bashford v. Barstow*, 4 Wis. 567; *State ex rel. McDill v. Board of State Canvassers*, 36 Wis. 498, 507; *State ex rel. Hadfield v. Grace*, 83 Wis. 295, 298, 299; *State ex rel. Nelson v. Emerson*, 137 Wis. 292; *People ex rel. Att'y Gen. v. Tisdale*, 1 Doug. (Mich.) 59; *May v. Board of Canvassers*, 94 Mich. 505, 514, 54 N. W. 377, 379; *Belknap v. Board of Canvassers*, 94 Mich. 516, 517, 54 N. W. 376; *People ex rel. Derby v. Rice*, 129 N. Y. 461, 29 N. E. 358; *People ex rel. Sherwood v. State Board of Canvassers*, 129 N. Y. 360, 14 L. R. A. 646; *State v. Governor*, 25 N. J. Law, 331, 348; *State ex rel. Sunderall v. McKenzie*, 10 N. Dak. 132, 138–140, 86 N. W. 231, 234, 235; *State ex rel. Benton v. Elder*, 31 Neb. 169, 183, 184, 10 L. R. A. 796, 801; *People ex rel. Noyes v. Board of Canvassers*, 126 N. Y. 392, 27 N. E. 792.

For the respondents there was a brief by the *Attorney General, Russell Jackson*, deputy attorney general, and *Bowler & Bowler* and *Martin, Martin & Martin*, of counsel, and oral argument by *Mr. Joseph Martin, Mr. Jackson*, and *Mr. E. R. Bowler*.

The following opinion was filed February 21, 1911:

KERWIN, J. Many interesting questions are raised upon this appeal and exhaustively argued by counsel on both sides. On the part of the relator it is insisted that upon the face of the returns he was entitled to the certificate of election, and that the board of state canvassers, without authority of law and contrary to the returns, gave the certificate of election to Thomas F. Konop, Democratic candidate. It is therefore claimed that this court should award a peremptory writ of *mandamus* compelling the board to re-assemble and give the

certificate to relator, and that under sec. 3452, Stats. (1898), this court should inquire into the facts of the election irrespective of the election returns and determine who was in fact entitled to the certificate of election by the greater number of legal votes cast.

On the part of the respondents it is insisted that, the board having performed its duties, issued the certificate of election to Mr. Konop, and adjourned *sine die,* it became *functus officio* and cannot be compelled by *mandamus* or otherwise to reconvene and issue a certificate to relator; and further that the returns show that Mr. Konop was elected and therefore the respondents were right in issuing the certificate to Mr. Konop.

Whether the board after it had performed its duty, issued a certificate, and adjourned *sine die* can be compelled to reconvene and issue a certificate to another is a delicate question and one upon which there is conflict of authority. It is claimed that *State ex rel. Rinder v. Goff,* 129 Wis. 668, 109 N. W. 628, is controlling here, and that upon the doctrine laid down there no relief can be had by *mandamus* to compel the issuance of a certificate in any case after the board has performed its duty and adjourned. But this court did not go to that extent in the *Rinder Case.* However, we do not regard it necessary to consider or decide whether *mandamus* will lie in any case, after the board of state canvassers has determined the result, issued the certificate of election, and adjourned *sine die,* to compel the issuance of a certificate to another candidate under existing laws.

A very able argument is made by counsel for relator based upon the proposition asserted by them that upon the face of the returns it was the duty of the board of state canvassers to determine that *Mr. Kustermann* received a plurality of all the votes cast, and that he was entitled to the certificate; therefore the certificate should have been issued to him. The return of the respondents to the writ is quite fully set forth in

the statement of facts and need not be repeated here. From such return it seems clear to us that the respondents were warranted in issuing the certificate to Mr. Konop, and that the returns of the county canvassers justified such action. The trouble seems to have arisen out of the return from Oconto county. The board of county canvassers of that county made and filed with the county clerk their statement of the result of the election in that county for representative in Congress, by which they certified that the

"foregoing and within tabular statement is correct and true, as compiled from the original returns made to the county clerk of said county, and as compared therewith by us, and that from such returns it appears that at the general election held in the several towns, wards, villages, and election districts of said county, on the first Tuesday succeeding the first Monday of November, A. D. 1910, being the eighth day of said month,

"The whole number of votes given for representative in Congress for the Ninth Congressional district was thirty-three hundred eighty-eight (3,388), of which number Thomas F. Konop received fourteen hundred fifty (1,450) votes;

"Alexander McEathron received thirty-nine (39) votes;

"*Gustave Kustermann* received seventeen hundred twenty-five (1,725) votes;

"Thomas J. Oliver received one hundred seventy-four (174) votes."

The certificate is in conformity with statute and in the usual form, except as to the tabular exhibit respecting the voting precinct in Oconto county called "Pensaukee 1st precinct." In the vertical column under the name "Thos. F. Konop" and opposite "Pensaukee, 1st precinct" are the figures "16," and just to the right of these are the figures "22," followed by a brace to the right of which appear the words "Shown on tally sheet. Inspectors' statement shows 16." The addition of the column immediately under the last precinct vote is given "1,444." Under the units in the figures 1,444 is the figure 6, and immediately under an addition showing "1,450," so

that the column as finally added gives Thomas F. Konop 1,450 votes in Oconto county. The controversy is over the six votes—whether the respondents were warranted in counting them for Mr. Konop. In other words, whether the state board should have determined that Konop received 1,450 votes in Oconto county or 1,444. Now if we take the second footing in the Konop column of the tabular exhibit and the certificate of the whole number of votes as heretofore quoted, both the tabular exhibit and the certificate are in harmony, each giving 1,450 votes, while if we take the first footing and the certificate they do not agree. But it is said by counsel for relator that the respondents were not authorized in crediting the six votes to Konop, but were bound by the number in the column of the tabular exhibit opposite each voting precinct. True, the tabular exhibit is a part of the return and is entitled to weight. But the statement of the number of votes in the body of the certified statement is at least as strong evidence as the tabular exhibit. And with the notation on the tabular exhibit and the second footing making the tabular exhibit correspond with the statement in the certificate, there seems to be no doubt that the county canvassers determined, and rightly, that Mr. Konop received 1,450 votes in Oconto county, and that upon the face of the returns the respondents were justified in so finding. It is quite obvious upon the face of the return of the county canvassers that they determined that the figures in the Konop column opposite the words "Pensaukee, 1st precinct," should be 22, not 16, and so made the corrections indicated on the face of the tabular exhibit. Nor can it be said that the county canvassers improperly made up the tabular exhibit, but on the contrary it must be presumed that they performed their duty.

Sec. 82, Stats. (1898), respecting the county canvassers, provides:

"On the assembling of the board they shall open and examine the returns, . . . and if, on examination of any returns

received, they shall be found so informal or incomplete that the board cannot intelligently canvass them, they shall dispatch a messenger with such returns to the inspectors who made them with a written specification of the informalities or defects, and command them to forthwith complete the same in the manner required by law and deliver them to said messenger, which such inspectors shall do. . . . For such purposes the board may adjourn as may be necessary, not more than four days at one time nor more than eight days in all."

Under this statute the county canvassers are authorized to require the returns from the inspectors, if found informal or incomplete, to be completed in the manner provided by law. The same or similar authority is conferred upon the state canvassers. Sec. 94, Stats. (1898), as amended by ch. 488, Laws of 1909. What proceedings were had before the county canvassers we only know from the returns. It may well be that an incomplete or informal return was furnished by the inspectors and afterwards corrected returns furnished in accordance with the statute and the correction made in the manner indicated after the return of the county canvassers had been prepared and before signing, or the county canvassers may have committed an error in copying in the figure 16 in the column instead of 22, as shown by the inspectors' returns, and on discovering the error made the correction by adding up the column and adding six so as to make the correct footing.

The original returns of the county canvassers are before us, and the figures including the figure 6 and the footings appear to be in the same handwriting and bear evidence that the additions were made by the board so as to give the correct number of votes to Mr. Konop. Another fact corroborative of this proposition is the certified copy of the inspectors' statement from the town clerk's office of the town of Pensaukee, Oconto county, made a part of the return to the writ and showing the result in the first precinct, town of Pensau-

kee, to be 22 votes for Mr. Konop. This statement is required to be filed and preserved with the town clerk by sec. 78, Stats. (1898), as amended by sec. 1, ch. 148, Laws of 1901. But however the irregularities on the tabular exhibit occurred is not very material, because such exhibit was made by the county canvassers, corresponds with the vote in the certificate, and must be presumed to be correct, since nothing appears in the returns to the contrary. The memorandum on the tabular exhibit as to the tally sheet, if evidence of anything, is not evidence that the county board of canvassers followed it. On the contrary it must be presumed that they determined the correct vote in the manner provided by law. Examination of the tally sheet may have aroused inquiry and investigation along the lines provided by law. It is true that the board of state canvassers, the respondents, were obliged to canvass from the regular returns before them under the power conferred by the statutes and could not go behind the returns, and in their return to the writ of *mandamus* they alleged that they did not go behind the returns of the county canvassers, and considered nothing else in arriving at their determination but the regular returns of the county canvassers. A great deal of space is occupied by counsel for relator in their brief with argument to the effect that the county canvassers or respondents could not consider the tally sheet, but there is no evidence that they determined the result of the election from the tally sheet. On the contrary, upon the facts set up in the return and admitted by the demurrer it appears that they did not, so it is unnecessary to determine whether the tally sheet could be considered or not.

Aside from the question that the respondents as a canvassing board has performed its duty, determined that Mr. Konop was elected, issued a certificate of election to him, and adjourned *sine die,* we think the record fully supports the action of the respondents, and that the relator has made no case which would warrant this court in awarding the writ of *man-*

damus. State ex rel. Rinder v. Goff, 129 Wis. 668, 109 N. W. 628; *State ex rel. Jones v. Oates,* 86 Wis. 634, 57 N. W. 296; *La Pointe v. O'Malley,* 46 Wis. 35, 50 N. W. 521; Merrill, Mandamus, § 142.

Sec. 3452, Stats. (1898), is also relied upon by counsel for relator. It is alleged in the petition, upon information and belief, that divers omissions were made by the inspectors throughout the district in counting and returning votes cast for relator so that his vote as canvassed and returned was smaller than he in fact received, and that such alleged errors which do not appear on the face of the returns may be reviewed in this action under sec. 3452, Stats. (1898). We shall not attempt to render an opinion upon the scope of this section, nor decide whether it applies to any case where the board of canvassers had issued the certificate of election and adjourned as in the instant case. It seems by its terms to cover cases only where it is deemed necessary to promote the ends of justice to inquire into the facts of the election, "irrespective of the election returns," and does not appear to reach the present case. Even conceding that the statute is valid and may be applied to the present case we do not think that it would "promote the ends of justice if we were now to" inquire into the facts of the election irrespective of the returns. Such an inquiry would take weeks and probably months. It appears that Mr. Konop's certificate is already filed and his name on the list of the next House; long before this court could reach any result the term of office will have begun; certainly any decree of this court rendered after March 4th next cannot oust Mr. Konop from office; the final determination of the right to office rests with the House of Representatives itself, and any inquiry by the court after the term of office has commenced in a proceeding to which Mr. Konop is not a party would seem to be futile to the last degree.

On the facts alleged in the return we are unable to say that the state canvassing board committed error or that it is clear

that they should have awarded the certificate to *Mr. Kustermann,* hence the demurrer to the return must be overruled. There being no suggestion that any material issue of fact can be taken on the return the writ will be denied.

By the Court.—The demurrer is overruled and the writ is denied.

The following opinion was filed February 23, 1911:

TIMLIN, J. I have also arrived at the conclusion that the writ should be denied and desire to make a record of the reasons which led me to that conclusion.

1. A statute of the United States provides:

"Before the first meeting of each Congress the clerk of the next preceding House of Representatives shall make a roll of the Representatives-elect, and place thereon the names of those persons, and of such persons only, whose credentials show that they were regularly elected in accordance with the laws of their states respectively, or the laws of the United States." 2 Fed. Stats. Ann. 215.

The return to the alternative writ shows that a certificate of election was issued by the state canvassing board to Thomas F. Konop on December 8, 1910, and filed with the secretary of state, whereupon the latter delivered to said Konop a certificate of his election and also forwarded a certificate to the House of Representatives at Washington as required by law, and further:

"That said Thomas F. Konop, to whom said certificate has been issued, is now in possession of the office to which he was so declared to be elected, and that his name now appears on the roll of the House of Representatives as a member-elect from the Ninth Congressional district of Wisconsin, of the Sixty-second Congress of the United States of America."

It also appeared in said return that the state canvassing board, after its canvass of said election and on December 8, 1910, adjourned without day. The certificate delivered to

Konop and filed in the House of Representatives bears date December 9, 1910. All this occurred prior to the service of the alternative writ, and all this is admitted by demurrer to the return to that writ. So that even on the assumption that the board of county canvassers of Oconto county erroneously arrived at its determination from a consideration of the poll list together with the return from the election inspectors, and that the board of state canvassers accepted the return of the board of county canvassers of Oconto county so based, the writ must be denied under the authority of *State ex rel. Rinder v. Goff,* 129 Wis. 668, 109 N. W. 628, if that case is not to be overruled. Quoting from that case:

"We simply hold that, where a canvass has been made and a certificate issued, the certificate holder cannot be deprived of his *prima facie* right to the office by any subsequent action of the canvassing board. His right must be contested and set aside in a proper action or proceeding brought for the purpose, and until this has been done *mandamus* will lie to place him in possession of the property and privileges of the office to which he has *prima facie* title."

Again:

"This court has held that one who has been declared by the proper canvassing board to have been elected to an office, and has received the proper certificate of election and duly qualified, is entitled to the possession of the office and its property and emoluments as against all the world except a *de facto* officer already in possession under color of authority, and that this right persists until a different result is reached in a *quo warranto* action or other proper proceeding to contest the right of the certificate holder. *State ex rel. Jones v. Oates,* 86 Wis. 634, 57 N. W. 296; *State ex rel. McCoale v. Kersten,* 118 Wis. 287, 95 N. W. 120."

The constitution of the United States makes the House of Representatives "judge of the elections, returns, and qualifications of its own members." And this excludes any jurisdiction on the part of this court to entertain or determine any question relating to the election, return, or qualification of

members of Congress after the matter has reached the stage above indicated. *O'Hara v. Powell,* 80 N. C. 103, and cases *infra.*

2. A motion to quash the alternative writ is also before the court. It is contended that the *mandamus* in the instant case may be supported under sec. 3452, Stats. (1898), relating to *mandamus.* That contains the following:

"In any proceedings by *mandamus* against any board of canvassers in the supreme court to compel the execution and delivery of a certificate of election to any person claiming to have been elected to the office of state senator or member of the assembly, or member of the house of representatives of the congress of the United States, or presidential elector, by the qualified electors of this state, the court may, if it is deemed necessary to promote the ends of justice, inquire into the facts of such election, irrespective of the election returns, and determine who was in fact entitled to the certificate of election to such office by the greater number of legal votes cast, and the certificate issued in pursuance of such determination shall be taken as the true and only lawful certificate of election to such office, and any other certificate of election to the same office issued by any board of canvassers shall be null and void."

This is clearly an election contest statute and cannot be made to do service in a political exigency as anything less than this. This is apparent from the provision that it is only the certificate issued in pursuance of "such determination" that shall be taken as the true and only lawful certificate of election to such office. What is "such determination?" The only determination theretofore mentioned in this statute is as follows:

"The court may . . . inquire into the facts of such election, irrespective of the election returns, and determine who was in fact entitled to the certificate of election to such office by the greater number of legal votes cast."

There is nothing in this statute giving such efficacy to any certificate of election except that issued in pursuance of such

determination. This statute is therefore unconstitutional as regards representatives in Congress under the clause of the federal constitution first quoted, and such is the consensus of judicial opinion everywhere with reference to statutes of this kind authorizing a contest and a trial of the election result on the merits in all cases where the constitution makes the legislative body the judge of the election, returns, and qualifications of its members. *Att'y Gen. ex rel. Beers v. Board of Canvassers,* 155 Mich. 44, 118 N. W. 584; *Vance v. Board of Canvassers,* 95 Mich. 462, 54 N. W. 1048; *Pound v. Board of Canvassers,* 120 Mich. 181, 79 N. W. 114; *O'Hara v. Powell,* 80 N. C. 103; *In re Election of McNeill,* 111 Pa. St. 235; *Dalton v. State ex rel. Richardson,* 43 Ohio St. 652, 3 N. E. 685; *Ellison v. Barnes,* 23 Utah, 183, 63 Pac. 899.

State ex rel. McDill v. Board of Canvassers, 36 Wis. 498, also recognizes this. Quoting from that case:

"We cannot determine the right to the office, but only the duty of the board of state canvassers in respect to the canvass. The power to determine the right is, by the constitution of the United States, vested exclusively in the House of Representatives. Art. I, sec. 5. Hence we cannot go behind the returns and investigate and correct frauds and mistakes, and adjudge which of the candidates was elected, but can only determine whether the board of state canvassers ought to include in its canvass and statement of the votes cast for representative in Congress those returns from Wood county."

There was no certificate of election issued in the *McDill Case.* Speaking of the board of canvassers the court said:

"They have, however, pending the present proceedings, voluntarily abstained from making the certificate required by law, of their determination of the result of such election, thus relieving the relator and the court from what might have caused embarrassment, and have gracefully submitted the whole matter to the adjudication of the court."

If it be said that under sec. 3452, Stats. (1898), this court could exercise a fraction of the power there attempted to be

conferred upon the court, the answer is that it is only to a certificate of election issued pursuant to a judgment of this court, after a contest on the merits, that this statute gives the effect of superseding a certificate of election theretofore issued. In this paragraph, speaking of the statute, I have used the word "unconstitutional." Perhaps in deference to the learned professors, journalists, and others who maintain that courts have usurped the power of declaring laws unconstitutional, I should have said that the provisions of the statute are inconsistent with those of the constitution, and I find it impossible to conform to both, hence follow the constitution as paramount.

3. The certificate of election having been issued and presented to the House of Representatives, the matter has passed into the control of that legislative body and any decision made by this court in this proceeding will have no binding force or efficacy. Neither Congress nor any one else is required to regard it or give it weight. The alleged duty of this court to make such proclamation or fulmination is therefore not a judicial duty. *Gordon v. U. S.* 117 U. S. 697. The decision of this court would be a vain and idle ceremony. *O'Hara v. Powell, supra; In re Election of McNeill, supra; Ellison v. Barnes, supra; Dalton v. State ex rel. Richardson, supra.* Nothing could be more insidiously damaging to the judicial department of government than a recognition of its power or duty to make proclamations to which no one is obliged to give heed or respect.

4. On the merits of the application there is no ground for the issue of the writ. It is uncontroverted that the board of state canvassers correctly canvassed the returns from all the counties constituting the Congressional district except Oconto county. Respecting this county it appears that the statement required to be made by the county canvassers and returned to the state canvassing board showed that Mr. Konop had received 1,450 votes in Oconto county; but the statute further

provided that the county canvassers "shall append to each such statement as part thereof a succinct tabular exhibit, in figures, of the votes cast at each election poll in the county for each office and person entering into the canvass embraced in such statement, whether canvassed or not, and if any votes were rejected shall specify the reasons therefor." Sec. 83, Stats. (1898).

This tabular statement showed that there were cast for relator in the first precinct of Pensaukee 56 votes and for his opponent, Konop, showed 16 votes, with the following annotation opposite the 16 votes: "22—Shown on the tally sheet. Inspectors' statement shows 16." The difference between 16 and 22 was then added at the foot of the column to 1,444, making 1,450. What the board of county canvassers of Oconto county had before it we do not know. Tally sheets are in some cases expressly authorized by statute. Ch. 459, Laws of 1901. In others by implication. Secs. 94*i* and 94*j*, Stats. (1898); Election Laws of 1910, p. 91. Whether there was a voting machine in the precinct in question we do not know. The board of state canvassers had before it, then, a certified statement from the county board of canvassers showing that Mr. Konop received 1,450 votes, and the county canvassers had appended to this statement and as part thereof a tabular exhibit in figures of the votes cast at each election poll showing 16 votes for Konop, corrected by the annotation aforesaid of 22, which brought his total vote of Oconto up to 1,450, corresponding with the certified statement. The certified statement is in nowise impeached unless it be by this tabular exhibit and the correction aforesaid, and the tabular exhibit is in nowise impeached except as it may be impeached by the memorandum aforesaid, indorsed thereon, relating to the correction. There is no showing that Mr. Konop did not get these 22 votes in the first precinct of Pensaukee. But it is contended that the memorandum of correction indicates that the board of county canvassers made the correction from the

tally sheets returned to them by the inspectors and that these tally sheets are not official documents or required to be returned. They were, however, treated as competent to be considered for the purpose of correcting the return in *State ex rel. Rinder v. Goff,* 129 Wis. 668, 109 N. W. 628. Another statute (sec. 82, Stats. 1898) providing for the county canvass authorized the county canvassers, if the return from the election inspectors of the various precincts shall be found so informal or incomplete that the board of county canvassers cannot intelligently canvass them, to dispatch a messenger with such returns to the inspectors with a written specification of the informalities or defects, and command the inspectors to forthwith complete the same in the manner required by law and deliver them to such messenger.

We have no proof that the county canvassers did this or omitted it, but we have in the return a certified copy of the duplicate statement of the canvass by the inspectors required by sec. 78, Stats. (1898), to be delivered to the town clerk, and this shows 22 votes for Mr. Konop. What the duplicate original which was delivered to the county canvassers shows we are not informed, except as may be indicated by the memorandum on the tabular exhibit above quoted. This memorandum is an extra-official statement not required by law to be made, and is in my opinion entirely insufficient to impeach the canvass of the state board or overthrow the certificate of election already issued.

The following opinion was filed March 14, 1911:

WINSLOW, C. J. (*concurring*). I entirely agree that the writ in this case should be quashed upon two plain propositions which I understand to be the only propositions necessary to decide, or in fact decided, in the case.

1. The certified statement of the county board of canvassers states positively that Mr. Konop received 1,450 votes in

Oconto county. This statement is not overcome by the figures on the tabular statement attached. The utmost that can be said about the tabular statement is that it is somewhat confused: it does not contradict nor overcome the positive assertion in the certified statement. In order to justify the issuance of a writ of *mandamus* the right thereto must be certain, and this cannot be said here.

2. Owing to the fact that the term of office commences within a few days and the House of Representatives is the ultimate tribunal which must decide who was in fact elected, this court does not deem that the "ends of justice" would be promoted by undertaking a fruitless inquiry into the facts of the election independent of the returns. Such an inquiry would consume much time, and any judgment rendered by this court at the end would have no substantial effect.

I do not understand that the principles laid down in the *Rinder Case* have any application here, because no one is in possession of the office at the time this judgment is rendered, nor do I understand that the court decides or intimates that it cannot compel a canvassing board to reconvene after final adjournment and perform its duty if it appear that it has failed to do so.

Further, I do not understand that the court decides or intimates that it may not in a proper case exercise the powers attempted to be conferred by the last clauses of sec. 3452, Stats. (1898). These questions are delicate and important questions which will deserve serious consideration when it becomes necessary to decide them.

The following opinion was filed March 14, 1911:

MARSHALL, J. (*concurring*). While I concur in the decision and in the court's real reason therefor, as I understand it, I fear what has been written may cause uncertainty as to the court's position,—uncertainty growing out of method of

treatment in its opinion, intensified by the additional opinion by my Brother TIMLIN. So I will place on file my understanding of what the court has decided as to minor questions underlying the ultimate one as to whether the return to the alternative writ and the writ itself show, as matter of law, the relator not to be entitled to, or at least under the circumstances should not be awarded, the relief prayed for.

Obviously the motion to quash presented the question of sufficiency of facts stated as ground for the writ, but it should be understood that the admissions involved in the motion go only to facts well pleaded. A demurrer or motion in the nature thereof does not admit pleaded conclusions of law. In this respect the suggestion that Konop is actually in possession of the office of member of Congress because it is so alleged as a conclusion in the return, challenges attention. Starting with the false premise as a verity the idea naturally followed that he could not be ousted from office by a proceeding of this kind. One false premise naturally leads to a false syllogism in the whole and a wrong conclusion.

The falsity of the premise that Konop, when the return was made, was practically a member of Congress—an incumbent of the office—though the time for which he was elected had not commenced, he had not been sworn in, and the office was actually in the possession of him whose term had not expired, is too obvious to need more than mentioning. The facts are stated in the return in accordance with common knowledge of lawyers and laymen as well. It is alleged that Konop has been merely awarded the certificate of election by the canvassing board, and filed it with the proper officer at Washington. Following that it is said "his name now appears on the rolls of the House of Representatives of the Sixty-second Congress." That means, necessarily, the future Congress, since the Sixty-second Congress could not come into existence till expiration of the Sixty-first Congress. So the status of Konop when the return was made was that of a

mere claimant for an office, who had been awarded the usual evidence of *prima facie* right thereto. The office itself was in possession of another, and the one holding such *prima facie* right and such other were claimants for the future term. I understand that was the view of the court when the case was decided.

There being no question as to the facts, as the court, I venture to say, understood them, the first mootable question was whether its jurisdiction extends to coercing a canvassing board, whose members have gone through the form of doing their duty; but in fact have ignored the majority candidate, as shown by mere mathematical work of determining the fact from the face of the returns, awarded the certificate to a person shown thereby to be in the minority and adjourned,—to reconvene and perform their full duty.

I cannot think the court doubts its jurisdiction in a case like this though there is no declaration of it in the opinion. The general scope of its power has been stated over and over again. The third broad grant in sec. 3, art. VII, of the constitution in these words, "It shall have power to issue writs of *habeas corpus, mandamus,* injunction, *quo warranto, certiorari* and other original and remedial writs, and to hear and determine the same," is almost unmeasurable in extent. It was early held that such clause was not used to furnish instrumentalities for executing preceding granted powers; that, as to the latter, authority to use all appropriate and usual instrumentalities was given as incident thereto, and that the third clause creating the boundless, so to speak, authority as to writs, was given for an independent field of jurisdiction,—"Original jurisdiction of certain proceedings at law and in equity to protect the general interests and welfare of the state and its people,"—as said in *Att'y Gen. v. Blossom,* 1 Wis. 317, quoted and approved in *Att'y Gen. v. Railroad Cos.* 35 Wis. 425; *State ex rel. Fourth Nat. Bank v. Johnson,* 103 Wis. 591, 79 N. W. 1081; *State ex rel. Fourth Nat. Bank v.*

Johnson, 105 Wis. 164, 83 N. W. 320; *In re Court of Honor,* 109 Wis. 625, 85 N. W. 497; *State ex rel. Cook v. Houser,* 122 Wis. 534, 100 N. W. 564; *State ex rel. Umbreit v. Helms,* 136 Wis. 432, 118 N. W. 158. It is a great power lodged in this court for its use on great occasions as they may arise requiring it, the sole judge as to the occasion and of the manner of meeting it being the court itself. No power but the people acting fundamentally can change that. The trust being of a high prerogative character, it was not intended that it should be used except upon prerogative occasions,—dire need for it, as has often been said, but when such need exists and when it does not is within the sound judgment of the court.

These expressions are found characterizing the power under discussion, commencing with *Att'y Gen. v. Blossom, supra:*

"It extends to all judicial questions affecting the sovereignty of the state, its franchises, or prerogatives, or the liberties of the people. *Quod ad statum reipublicæ pertinet.*"

"Original jurisdiction of certain writs because they are designed for the very purpose of protecting the sovereignty and its ordained officers from invasion or intrusion, and also to nerve its arm to protect its citizens in their liberties, and to guard its prerogatives and franchises against invasion."

"Original jurisdiction of certain proceedings at law and in equity, to protect the general interests and welfare of the state and its people, which it would not do to dissipate and scatter among many inferior courts."

"A court of first resort on all judicial questions affecting the sovereignty of the state, its franchises or the prerogatives or liberties of its people."

As thus defined the original authority of this court is written in the constitution as effectually as words could do it. I reiterate, it is as broad in its sphere of activity as possibilities affecting the interests which might appropriately require use of a power of its high prerogative character. It is not meas-

urable by any legislative notion or restrictable thereby, or circumscribed by the ancient character of the common-law writs mentioned. The writs are usable according to such character or expansible and adaptable to meet, as we have seen, all the possibilities within the scope of the sovereign power itself, as the court has construed the constitutional grant. *State ex rel. Umbreit v. Helms, supra.*

It has always been used sparingly. With continued appreciation of its purpose it always will be used sparingly. But with proper conception *here* of the great trust reposed *here* and the possible necessity for its activity upon application made *here* to defend, perhaps the very citadel of the people's liberty, its existence will never be denied or the great scope of it cast into doubt. I aim to make this declaration as forceful as I can and, so far as I may aid under the circumstances, there will be no doubt about the court's position as I understand it. It was along this line the court entrenched its jurisdiction in the cases cited, meeting all difficulties of defining it, thus broadly, and rightly declaring in answer to appeals to restrict it by construction because of its supposed infirmities:—"if we should find it impossible to interpret the organic law of the court, we might not unjustly be held to confess our unfitness for this place."

I write as I have written for I deem it unfortunate for the court to say: "We do not regard it necessary to consider or decide whether *mandamus* will lie in any case after the board of state canvassers has determined the result, issued the certificate of election, and adjourned *sine die,* to compel the issuance of a certificate to another candidate under existing laws." At the very beginning, the court of necessity had to decide that very question before going further. A decision and opinion covering other points, without first meeting such question, would be, to use the language of my Brother TIMLIN, "a mere fulmination." That the case was decided largely upon the merits and many points were treated lying

beyond the initial one, shows conclusively that it was the judgment of the court that it had jurisdiction. Therefore the concession must be regarded as pregnant with judicial assertion.

Following the foregoing it would seem needless to cite any of the number of instances where original jurisdiction of this court has been exercised in circumstances similar to those here, if assertion of jurisdiction were not left by the court to implication and denied independently. In *State ex rel. McDill v. Board of State Canvassers,* 36 Wis. 498, such a case as this, except the certificate had not been issued, jurisdiction was taken, and regarded as undoubted, to consider and decide all questions of fact and law presented. No doubt of power was entertained. That seems certain. The embarrassment suggested contingent upon the certificate having been issued and the board of canvassers adjourned, had reference not to power, but whether in such circumstances power ought to be exercised. No thought was entertained that authority was dependable upon anything but the constitution itself, or but what such authority was ample. The thought that, possibly, the court could not give effective relief in case of the board having issued the certificate to one not entitled thereto upon the face of the returns, and adjourned would not, I venture to say, have been entertained in the light of adjudications on the subject we now have the benefit of.

In *State ex rel. Hadfield v. Grace,* 83 Wis. 295, 53 N. W. 444, the board of canvassers awarded the decision by disobeying the law in reaching the result. One mooted question was whether the board could, under such circumstances, be compelled to reconvene, perform its full duty, and make the proper award. It was decided in the affirmative, cases in several other jurisdictions to the same effect being cited.

There was no room here to doubt the jurisdiction or propriety of exercising it because of *State ex rel. Rinder v. Goff,* 129 Wis. 668, 109 N. W. 628. The idea that the applica-

tion for relief here in effect called for overruling the decision there shows a misconception of what was before decided, and of that I can safely appeal to the record. There the court took jurisdiction to decide as to the duty of the respondent. It held there was power in such a case because the wrong complained of affected "the sovereignty of the state, its franchises or prerogatives, or liberties of the people," but, aside from some special question involved having state-wide effect, the jurisdiction was not affordable in respect to a mere local office. Relief was however denied upon the ground that the primary election law created a new office, that of candidate for office—that is, that it gave to the person receiving the greatest number of party votes at the primary for a particular office, the right to be the sole party candidate for such office at the succeeding election; that upon, in due course, his receiving the certificate of nomination he acquired full official status; because an incumbent of the office of party candidate for the particular place in question, and, therefore, *mandamus* to coerce the ministerial officers, having only to do with awarding, in due course, the *prima facie* right to the office, after their having done so, and thus created an incumbency—is improper, because then there is a plain remedy at law by *quo warranto,*—the ordinary legal remedy,—to try the title to the office. The familiar rule was adhered to that resort can only be had to an extraordinary remedy when the common one will not do. *Ubi cessat remedium ordinarium ibi decurritur ad extraordinarium.*

True, this language was used in *State ex rel. Rinder v. Goff, supra:* "This court has held the one who has been declared by the proper canvassing board to have been elected to an office and has received the proper certificate of election and duly qualified, is entitled to the possession of the office," adding, "till otherwise determined in *quo warranto* proceedings." That, as will be seen by reference to authorities relied on, had reference to the doctrine that, after the term of office has in

fact commenced, and the person awarded the certificate has qualified and taken possession, or is competent to take possession, his right is not triable in this kind of a proceeding.

The court referred to *State ex rel. Jones v. Oates,* 86 Wis. 634, 57 N. W. 296, which was not an action of this sort though therein we find the idea significant that after the person holding the *prima facie* evidence of the right has qualified and taken possession he cannot be *mandamused* out of office by a rival who claims to have been the one really elected. A case more nearly in point is *State ex rel. Mercer v. Sullivan,* 83 Wis. 416, 53 N. W. 677. There the rule is definitely stated thus:

"Where a person declared by the inspectors of an election to have been duly elected to an office has qualified and entered upon its duties, *mandamus* will not lie to compel the inspectors to declare another person elected. The title to the office should be tried on *quo warranto.*"

The reason therefor was stated to be that "as soon as the status is such that *quo warranto* will lie, *mandamus* never lies where the former is adequate." It is needless to remark that *quo warranto* will not lie against a person who merely holds a certificate of election, as in this case. The logic of *State ex rel. Mercer v. Sullivan* follows,—*mandamus* will lie.

The foregoing I venture to say is supported by the text-books and all well considered adjudications under systems like ours. This from sec. 182 of Merrill on Mandamus, supported by authorities, many of which are cited in *State ex rel. Hadfield v. Grace, supra,* is a good type of text-book phrasings of the law:

"The fact that a canvassing board has already declared the result and issued a certificate of election to another person is no adequate return to an alternative writ of *mandamus* to canvass the returns properly and to declare the proper result, when returns have been improperly counted or improperly rejected. Such action does not oust the incumbent, and is

often necessary to put the relator in a position to contest his rights."

In the cases cited a clear distinction is drawn, as indicated in the text, between compelling the board to reconvene after the one holding the certificate has actually taken office or qualified and the term commenced, and before, while there exists only the mere evidence of right to the office.

In *Rosenthal v. State Board of Canvassers,* 50 Kan. 129, 32 Pac. 129, the question was raised as in this case. The office was membership in Congress. The canvassing board was held *functus officio* because it had done all it had a right to do; that whether the one it awarded the certificate was the person legally elected or not was another matter to be settled by Congressional action; that if the board had failed to award the certificate to the one entitled thereto upon the face of the returns and adjourned, the members could have been compelled to reconvene and perform their full duty. This language was used: "If a canvass has been wrongfully or improperly made and the board has adjourned *sine die,* this court may compel it to reassemble and make a correct canvass of all the returns before it at the time of the first canvass." Of course that was said, contemplating the limitation that the one holding the spurious certificate had not yet become an actual incumbent of the office.

Authorities in great number could be added to the foregoing. Indeed I venture to say there is no conflict, when the exact situation here with reference thereto is appreciated. I must say in concluding on this, my understanding is that the court is not really out of harmony with what I have said.

The idea may find lodgment with some from reading the court's opinion that it cannot deal with such a case as this because the legislative body is the judge of the qualifications of its members. That will be found expressly rejected in *People ex rel. Sherwood v. State Board of Canvassers,* 129 N. Y. 360, 29 N. E. 345, and many cases which might be re-

ferred to. It is pointed out that such an action does not involve a contest but whether certain ministerial officers have done their duty in awarding the *prima facie* right indicated by the face of the returns. *Att'y Gen. ex rel. Beers v. Board of Canvassers,* 155 Mich. 44, 118 N. W. 584, is in harmony therewith. There an attempt was made to compel the board to determine, not who received the most votes, as here, by the face of the returns, but whether the majority candidate for state senator was eligible to the office,—a question lodged by the constitution in the senate. The same is true of *In re Election of McNeill,* 111 Pa. St. 235, and other cases involving election contests.

Of course, in such cases each legislative body is the judge. It would be the plainest of usurpation to attempt to invade its jurisdiction. But the determination of the actual right to a legislative office is one thing and that of who, at the hands of the canvassing board, is entitled to its evidence of right, is quite another thing. Jurisdiction as to the former is in the legislative body. In the latter it is in the canvassing board and that can be compelled by judicial proceedings to exercise jurisdiction properly. Unless one keeps the distinctions in mind between trial of the right to an office, and trial of whether a canvassing board has properly performed its duty in determining from the face of the returns who is entitled to the certificate of election, he will be liable to fall into confusion and error.

I think the court in discussing this case must have appreciated the last foregoing or would not have inquired, as it did, into whether the state board awarded the certificate according to the face of the returns. The board had no other authority. Until it correctly exercised that it could not make itself *functus officio* by adjourning. If it was not *functus officio* because of having failed to do its duty, it remained—till some other remedy intervened,—as one would upon the person holding a wrongfully issued certificate becoming an

incumbent of the office,—subject to coercion by this court to exercise its jurisdiction, the case itself being important enough according to the judicial policy established, to warrant it in opening its doors.

That part of the court's opinion suggesting that the board had done its duty merely because of having gone through the form thereof, and so cannot be coerced, is misleading. It will be found by the authorities cited that such a board, as we have said, cannot be rightly claimed to have done its duty and so extinguished its authority, till it shall have properly performed that duty. The cases where the expression is used, the board having done its duty it is *functus officio* and cannot be *mandamused,* are all where there was performance of duty in fact—a determination according to correct mathematical work, and it was sought to coerce the board to go further and exercise a jurisdiction not possessed by it—determine the real right to the office.

I will add that I do not think sec. 3452, Stats. (1898), has anything to do as regards whether the state board did its duty or not. Whatever power the court has in that matter it takes from the constitution, not from such section. So far as that might be considered a practice regulation, this court would follow it, doubtless, when reasonably practicable. So far as it attempts to confer power, it does not add, I think, to the grant contained in the constitution. So far as, in attempting to regulate, it limits or prejudicially hampers the power, of course, it is inefficient. I agree with the suggestion on this in the last part of the court's opinion.

I also agree that, on the facts, it is very difficult to say whether the state board read the face of the returns in the right aspect; that the right to the office will be presentable to the legislative body without delay which, if challenged in respect to the matter, must decide it, and will do so regardless of evidence afforded by any certificate furnished by the board of canvassers, except so far as that will be given *prima facie*

effect; and, further, that whether to allow use of the court's jurisdiction or not, and especially by a *mandamus* proceeding, is discretionary; so the proceeding ought to be dismissed. It is only where the right is clear and there has been a clear omission of duty in the premises and the substantial interests of the state and the parties would be otherwise seriously prejudiced, that the remedy should be allowed and there is a real right to it.

JENSEN, Respondent, vs. WISCONSIN CENTRAL RAILWAY COMPANY, Appellant.

October 27, 1910—March 14, 1911.

Railroads: Injuries to employees: Special verdict: Negligence: Contributory negligence: Location of cattle-guard and switch.

1. Sec. 1816, Stats. (Laws of 1907, ch. 254), providing that in every action against a railroad company for injuries sustained by an employee the court shall submit certain questions to the jury, does not require such questions to be submitted in the exact language of the statute, but merely that the matters covered thereby, so far as they are in issue on the pleadings and in controversy on the evidence, shall be specially submitted by appropriate questions.
2. Said sec. 1816 does not change the settled practice as to special verdicts, except that in actions governed by it a special verdict is to be taken regardless of any request by counsel, and that, where the situation requires it, the verdict should include a question as to whether contributing fault of the defendant was greater than that of the injured employee.
3. The questions submitted in such a case should follow approved forms rather than adopt literally the statutory language. Thus the terms "want of ordinary care" and "proximately contributing" should be used rather than the statutory terms "negligence" and "directly contributing;" and as to comparative negligence the question may be simply, "If you find that mutual fault of the defendant and the plaintiff proximately caused the injury, was the fault of the defendant greater?"

4. Where the undisputed testimony of experts is that the location, with reference to each other, of a switch and a cattle-guard in a railroad yard was in accordance with the customary construction of railroads, the jury are not warranted in finding, solely upon their own judgment, that such location was not consistent with ordinary care.

APPEAL from a judgment of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Reversed.*

Action to recover for personal injury.

The injury occurred while plaintiff was on duty in defendant's railroad yard at Hurley, Wisconsin. He was an experienced railroad man about twenty-three years of age, but not familiar with the particular railroad yard, though it was arranged as yards customarily were on defendant's and other railroads. On the morning of the injury, plaintiff was acting as a fireman on an engine running on slow time as an extra. The start was made at Ashland with Bessemer as the destination. The journey was made slowly because of the engine working badly, it being difficult to keep up steam, though not on account of any defect in the appliance. That difficulty made it necessary for plaintiff to perform more labor than ordinarily. Upon arriving at Hurley it was found that there was a freight train ahead which was liable to delay the journey unless the engine in question was run in from the west on the station passing track, down such track by such train, and out on the main track to the east. Such train was standing about in front of the depot. The necessity of passing it in order to proceed without delay was discovered after proceeding by the westerly end of the passing track and down near the rear of the train. While the engine and such train were so circumstanced the engineer of the former went forward to consult with the conductor of the latter and arrange for passing. During the absence plaintiff was left in charge of the engine. The switch of the passing track was about sixty feet east of the westerly end of the yard.

At such end there was located the customary cattle-guard, constructed in the customary way, the right-of-way fences being connected therewith on either side in the usual way by conspicuous wing fences. There was a highway and sidewalks which crossed the right of way some sixty feet east of the switch stand. In order for the engine to go in on the passing track it was necessary to back up by the switch stand into the vicinity of the cattle-guard. The crew were required to do the switching. The length of the engine was such that in order to back it up so as to clear the switch the cab would be near the cattle-guard and liable to be at that point, without attention being used to avoid it. The engine was backed toward the cattle-guard at the rate of about eight or ten miles per hour. Upon nearing the switch it was slowed down and allowed to run under its momentum. On the way back plaintiff busied himself, somewhat, by firing and then by looking out at one of the side windows of the cab. He did not look in the direction the engine was moving. In the meantime he was handed the switch key and told to alight and throw the switch and to be expeditious about it. As the engine was about to pass the switch the engineer applied the air brake, intending to bring the engine to a stand at a convenient distance east of the entrance upon the passing track. The plaintiff, as he claims, took a proper location for alighting from the cab on the side toward the switch stand. He stood in such location facing the front of the cab, grasping with the left hand the hand-rail on the engine, his feet being about twenty inches above the ground. It was a bright day. A glance in the direction the engine was moving at any time for several hundred feet before reaching the switch would have disclosed the location of the cattle-guard with reference thereto. Plaintiff faced the other way. He did not look in the direction he was going at all. After passing the switch stand and while the engine was still backing at a speed of

about five miles per hour and plaintiff facing in the opposite direction, with his standing place about twenty inches above the ends of the ties, he, without paying any heed to where he would land, let go the handhold and slipped or jumped backward. According to his testimony he became conscious of being near the cattle-guard just as he released his hold on the engine and admonished the engineer to set the emergency brake. He struck on the wing fence at the cattle-guard, then rolled down, throwing one leg over the rail so that the engine wheels passed over and severed it. The engineer, at the instant plaintiff alighted, was attentive to his duties in respect to placing his engine in proper position to start in on the passing track upon the switch being turned. He heard a crash as plaintiff alighted on the wing fence, which caused him to look instantly in that direction and observe plaintiff's peril. He brought his engine to a stand as soon as possible. It was properly equipped and the engineer properly handled it, bringing it to a stop in the course of about eighteen feet after plaintiff was observed to be in peril. In the meantime the injury took place. The crew knew it was necessary for the engine to be moved in on the passing track without much delay in order to clear the way for a train soon expected from the west. There was no occasion, however, for special hurry because there was, as yet, no warning of proximity of such train. The customary way, and the one supposed to be required in the exercise of ordinary care, to alight from a moving engine, is to face and jump in the direction of the motion and to look before doing so. Plaintiff was aware of that. The engine was not moving at a dangerous rate of speed, as regards an experienced railroad man in the course of his work jumping from it in a proper manner and under proper conditions. Plaintiff knew the necessity for side fences at the ends of railroad yards and he knew of the general features of railroad switches, of which the one in question was a type.

The cause was submitted to the jury on the evidence, resulting in the following verdict:

"(1) Was defendant, or any officer, agent, servant or employee, other than plaintiff, guilty of negligence directly contributing to plaintiff's injury as alleged? *A.* Yes.

"(2) Was defendant guilty of negligence directly contributing to plaintiff's injury by negligently locating its said switch too near the said cattle-guard, as alleged? *A.* Yes.

"(3) Was defendant guilty of negligence directly contributing to plaintiff's injury by suffering its said engine to get into and remain in a defective condition and by using the same in said defective condition, as alleged? *A.* No.

"(4) Was defendant guilty of negligence directly contributing to plaintiff's injury by its said engineer, Janes, while in charge of said engine, commanding plaintiff to jump off said engine while the same was in motion, as alleged? *A.* No.

"(5) Was defendant guilty of negligence directly contributing to plaintiff's injury by its said engineer, Janes, failing to set the emergency brake as soon as he could have reasonably done so, at the time of said accident, as alleged? *A.* No.

"(6) If you answer the above questions by 'Yes,' or any of them by 'Yes,' was plaintiff guilty of any negligence which directly contributed to his said injury? *A.* Yes.

"(7) If you answer the last question by 'Yes,' was said negligence of said plaintiff slighter or greater as a contributing cause to his said injury than that of defendant company's negligence or any of its officers agents, servants or employees other than plaintiff? *A.* Slighter.

"(8) If you answer questions 1 to 5, inclusive, by 'Yes,' or any of them by 'Yes,' then was said negligent acts of defendant the proximate cause of plaintiff's injury? *A.* Yes.

"(9) If you do not find that all of said alleged acts of negligence were the proximate cause of plaintiff's injury, you will write in the number of such questions only, as you find were the proximate cause of the plaintiff's injury? *A.* Questions number 1 and 2 only.

"(10) If, from your answers to the foregoing questions, the court is of the opinion that the plaintiff should recover, at what sum do you assess plaintiff's damages? *A.* Five thousand ($5,000) dollars."

Judgment was rendered on the verdict in plaintiff's favor. Various motions, objections, and requests were made in plaintiff's behalf and rulings made thereon and exceptions taken thereto, which will be mentioned in detail in the opinion so far as necessary to the final result of the appeal.

For the appellant there was a brief by *Glicksman, Gold & Corrigan,* and oral argument by *W. D. Corrigan.*

For the respondent there was a brief by *Sanborn, Lamoreux & Pray,* attorneys, and *Horace B. Walmsley,* of counsel, and oral argument by *Mr. A. W. Sanborn, Mr. A. T. Pray,* and *Mr. Walmsley.*

The following opinion was filed December 6, 1910:

MARSHALL, J. The conclusion reached in this case renders a general treatment of the form of verdict adopted by the trial court, in respect to which a number of criticisms are made and errors suggested by counsel for appellant, sufficient to dispose of all such matters. Such general treatment is not only appropriate to the case, but may be helpful in administering the law as it exists with the legislative change effected by ch. 254, Laws of 1907. It is quite evident that notwithstanding the exposition of the features thereof in *Kiley v. C., M. & St. P. R. Co.* 138 Wis. 215, 119 N. W. 309, 120 N. W. 756; *Boucher v. Wis. Cent. R. Co.* 141 Wis. 160, 123 N. W. 913; and *Zeratsky v. C., M. & St. P. R. Co.* 141 Wis. 423, 123 N. W. 904, there is yet, and perhaps not without warrant because of the crudities of the legislation, considerable uncertainty in the minds of bench and bar as to correct practice in submitting a case of this sort to a jury. That is manifest here from the fact that the trial court submitted three questions covering such features, nearly in the words of the statute, explaining some of such words so as to convey an understandable meaning thereof, in harmony with settled legal principles, and in addition added other questions so as to make the verdict also respond to the general special verdict law, in harmony with the settled practice in respect thereto.

First there was submitted a question in substantial literal compliance with the supposed requirement that the jury in such a case shall be asked whether "the company, or any officer, agent, servant or employee, other than the person injured, was guilty of negligence directly contributing to the injury?" That was followed by questions covering the specific acts of negligence alleged, which were, in turn, followed by a question, substantially in literal compliance with the statute, as to "whether the person injured was guilty of any negligence which directly contributed to the injury," and again by a question, in like literal compliance, as to "whether the negligence of the company or any of its officers, agents, servants or employees, other than the plaintiff, was slighter or greater as a contributing cause of the injury than negligence of the plaintiff;" then, upon the theory that, possibly, the supposed legislative questions would not, though answered in plaintiff's favor, find actionable negligence, for want of a finding on the subject of proximate cause,—a question, substantially in the usual form, was added on such subject.

Thus a double verdict was obtained. In one respect it is substantially in literal compliance with the statute of 1907, and in another in compliance with the general special verdict law. The learned trial court used that extreme care, and in addition explained the word "negligence" as used in the questions to mean want of ordinary care, and the words "directly contribute" to mean proximately contribute. On the whole, the questions covered the case, though no such double presentation is necessary and might be confusing. Moreover, without adequate explanation of the questions, it might lead to harmful error.

It is quite plain that an inquiry in literal compliance with the first feature of the law of 1907 referred to, could not be answered by *yes* or *no* and inform the court with reasonable certainty of a unanimous agreement upon either of the sev-

eral ideas disjunctively joined contrary to the settled practice on the subject which hardly admits of legislative interference. We must assume that such feature only requires the subject to which it refers to be covered by one or more appropriate questions, each involving a single issuable idea, according to circumstances, in accordance with the practice under the general special verdict law.

The term "negligence," instead of "want of ordinary care," is used uniformly in the new statute. The learned trial court repeated it some nine times in the verdict. This court, in the cases cited, construed such term to mean "want of ordinary care." That being the case, it were better to use the latter term in such a verdict and not depend upon using a supposed equivalent which is not such in fact without the aid of judicial construction.

The learned trial court, in supposed necessary compliance with the new law, used the term "directly contribute" six times in the verdict, giving the same, by instructions and appropriate supplementary questions, as before indicated, the effect of "proximately contributing." Here again it were better to have used, in the question, the term "proximately contributing," in harmony with this court's construction of the statute, instead of a supposed equivalent which is not without the aid of judicial construction.

Without further discussing the subject, covered by the several criticisms of the verdict here, it is considered that the law of 1907 simply requires the alleged actionable want of ordinary care of the defendant, the alleged or claimed want of ordinary care, if any, of the plaintiff, the proximate relation to the injury of such want of ordinary care, and in case of there being such want of care on both sides, whether that of the defendant was the greater, to be specially submitted to the jury. It does not, in effect, change the form of submission required under the general special verdict statute and the settled practice in relation thereto, except as to adding the new element.

The issues should be submitted accordingly, so far as they are involved on the evidence, legal terms being used in the questions in connection with appropriate explanations in the charge, so that a finding will result, specially, on each of the detail facts in issue on the pleadings and in controversy on the evidence. Neither the subject of want of ordinary care of the defendant or of the plaintiff need be submitted, unless, on the whole evidence, there is room for reasonable differences of opinion in respect thereto. In case of want of ordinary care of both parties being in controversy, so findings may result, convicting both of such fault and that the fault of each was in proximate relation to the injury, a question should be submitted as to which was the greater, but it need not be, and better not be, submitted in the set phrase of whether the fault of the injured party "was greater or slighter as a contributing cause," etc. The statute should be administered in its spirit. That requires, only, in case of mutual fault, that the verdict shall determine whether the fault of the defendant was the greater. The better way, it seems, is to submit the simple question: If you find that mutual fault of the defendant and the plaintiff proximately caused the injury, was the fault of the defendant the greater?

The foregoing is in strict harmony with the decisions heretofore rendered respecting the law of 1907. It gives full effect thereto, as it has been construed, and will enable trial courts to readily apply it in all situations calling therefor. It leaves the practice before the new enactment, with which the bench and bar are familiar, entirely undisturbed, except, whereas, formerly the trial court was not required to submit the cause for a special verdict unless requested to do so by counsel for at least one of the parties, now the cause should be so submitted regardless of any request, and, added to the usual form for a verdict in such cases, where the situation requires it, should be a question as to whether contributing fault of the defendant was the greater.

As before indicated, it is considered that question 1 of the special verdict was sent to the jury, thinking that, possibly, it might be held necessary, and for certainty of properly covering the case, questions 2 to 5, inclusive, were asked, covering in detail the alleged negligent conduct of defendant. The four questions, except the one numbered 2, having been answered in appellant's favor, if there be no evidence to warrant a finding as to that one in respondent's favor, the answer by the jury should have been changed from "Yes" to "No;" a like change made as to question 1, or the question stricken from the verdict as unnecessary, and question 7 likewise stricken from the verdict so as to have made all the findings harmonize with a negative finding to number 2, and judgment have been rendered on the corrected verdict in defendant's favor.

We have searched the record diligently for evidence that appellant did not exercise ordinary care in respect to locating the switch with reference to the cattle-guard. On the argument, counsel for respondent conceded there was none other than inferences from the physical situation, arguing that it was competent for the jury, in their discretion, to find from such inferences in favor of plaintiff, notwithstanding the undisputed evidence of experts that the switch and cattle-guard were located in accordance with the customary construction of roads, and particularly of appellant's road. Counsel's contention would render the arrangements of important industries, though designed by the best informed men on such matters, and according to the method adopted by the great mass of mankind in the same line of work, subject to condemnation by a jury of non-experts, solely upon their own judgment, as not consistent with ordinary care. No authority is presented in support of such claim and for the very good reason, we presume, that none exists.

The proper standard of defendant's duty was the care which the great mass of mankind ordinarily exercise under

the same or similar circumstances. Now and then it appears that the customary way of doing things is utterly disregardful of personal safety, where it is said, the mere fact that the way adopted was the customary way, is not a defense against the claim of liability. They are very extreme cases, quite different from one where men of judgment and experience commonly for a long time have been accustomed to arrange premises and instrumentalities for an ordinary business enterprise like a railroad, in a particular way, found by experience to be reasonably safe and convenient.

It seems that little more need be said. The switch and cattle-guard were necessary appurtenances of defendant's business. It necessarily possessed such large measure of freedom in laying out its railroad yard and arranging the instrumentalities in connection therewith, that pretty clear evidence would be required to warrant condemning it of being guilty of actionable negligence in the matter. With no evidence whatever in that respect, but, on the contrary, affirmative proof in abundance that it acted with all the care ordinarily exercised in such matters, there was no controversy on the question for solution by a jury. This court has often held, in terms or in effect, that if a person acts in the customary way and is not obviously careless as to the safety of persons or property of others, he cannot properly be convicted of having been guilty of actionable negligence. The logic is unanswerable, since the test of actionable negligence is absence of ordinary care, and ordinary care is the care exercised by the great mass of mankind, that a person whose conduct is in harmony with that of such great mass, under the same or similar circumstances, is not guilty of actionable wrong. With the exception noted, the rule is universal and has been often so recognized by this court. *Guinard v. Knapp-Stout & Co. Co.* 95 Wis. 482, 70 N. W. 671; *Innes v. Milwaukee,* 96 Wis. 170. 174, 70 N. W. 1064; *Prybilski v. Northwestern C. R. Co.* 98 Wis. 413, 416, 74 N. W. 117; *Dehsoy v. Mil-*

waukee E. R. & L. Co. 110 Wis. 412, 416, 85 N. W. 973; *Boyce v. Wilbur L. Co.* 119 Wis. 642, 646, 97 N. W. 563. In these and other authorities, the idea will be found distinctly condemned that a jury can be permitted to use, as a standard by which to test the conduct of the defendant, their conception of what should be considered due care, independently of ordinary care gauged by what is ordinarily done under the same or similar circumstances.

By the Court.—It follows that the judgment appealed from must be reversed, and the cause remanded for judgment dismissing the action with costs.

The respondent moved that the mandate be modified so as to direct further proceedings in the court below according to law, and so as to grant leave to the plaintiff to move in the court below for a new trial and for such other or further relief as he might show himself entitled to on account of errors or irregularities in the conduct and trial of the case.

The motion was denied March 14, 1911.

STATE EX REL. KENOSHA GAS & ELECTRIC COMPANY, Respondent, vs. KENOSHA ELECTRIC RAILWAY COMPANY, Appellant.

November 18, 1910—March 14, 1911.

Appeal: Matters considered: Quo warranto: *Municipal corporations: Franchises: Electric current: Use of streets: Repeal of statutes: Public utilities: Railroad commission: Certificate of necessity: Constitutional law: Legislative power: Delegation.*

1. On an appeal only matters to some degree involved in the issues closed by the determination appealed from will be considered.
2. In a *quo warranto* action to test the claim of right to exercise a pretended franchise, the sole question triable is whether the defendant possess the right in fact referable to the grant.

3. A municipal ordinance empowering a corporation "to lay down in the ground, put on poles and otherwise attach wires or other suitable conductors for the transmission of electricity, upon, over, through, under and in the streets, lanes, alleys and public grounds" of the city, includes power to transmit electric current, using the public way as indicated, for all lawful purposes.
4. Ch. 499, Laws of 1907, as amended by ch. 180, Laws of 1909, so far as in conflict with sec. 1780*b*, Stats. (1898), supersedes the same.
5. Where an indeterminate permit has been acquired under the law of 1907 referred to, as amended, within the scope thereof the municipality is under disability to grant any conflicting franchise privilege, except in case of public necessity and convenience, the fact in that regard to be found as matter of fact and certified by the railroad rate commission prior to making such conflicting grant.
6. While the legislature cannot empower the railroad rate commission to exercise legislative power, it may clothe it with authority to administer a law requiring, as an incident to the administrative duty, the ascertainment of facts such as is required in passing upon an application for a certificate of convenience and necessity under the public utility law.

[Syllabus by MARSHALL, J.]

BARNES, J., WINSLOW, C. J., and SIEBECKER, J., dissent.

APPEAL from an order of the circuit court for Kenosha county: E. B. BELDEN, Circuit Judge. *Affirmed.*

Quo warranto to oust defendant from an alleged franchise to use the streets of the city of Kenosha for distributing electric current for light, heat, and power.

The complaint, by appropriate allegations, sets forth the corporate character of the parties and that the purposes of each, according to its articles of organization, is to generate and distribute electric current for light, heat, and power, and all lawful purposes; and also the following, in substance: Relator is the owner of real and personal property in the city of Kenosha, Wisconsin, and a large taxpayer thereof. May 28, 1909, and at all times stated in the complaint, it maintained and operated in said city a plant for the generation and distribution of electric current for all lawful pur-

poses, and to that end occupied the streets of said city with the essentials thereto, under an ordinance duly granted by said city February 2, 1891, giving full power in that regard, said ordinance in terms empowering the grantee of the franchise "to lay down in the ground, put on poles and otherwise attach wires or other suitable conductors for the transmission of electricity, upon, over, through, under and in the streets, lanes, alleys and public grounds of the city and to put in place and furnish electric lights for public and private lighting." March 21, 1898, such ordinance was duly amended but without narrowing at all the powers theretofore granted. All rights conferred by the two ordinances were duly assigned to the relator and were possessed and enjoyed by it till May 28, 1909, at which time, pursuant to ch. 499, Laws of 1907, and the amendment thereof the franchise rights and privileges granted by such ordinance were, in form, surrendered, and relator received in lieu thereof from the state of Wisconsin an indeterminate permit as a public utility of said city of Kenosha for the purpose of furnishing electric light and electric current to said city and the inhabitants thereof. Since that time it has enjoyed all the privileges suggested under such permit. June 7, 1909, said city, with knowledge of the facts aforesaid, granted to defendant a franchise covering the same species of privilege theretofore enjoyed by the relator. Prior thereto defendant did not secure from the railroad commission of Wisconsin a declaration that public convenience and necessity required said second public utility in said city, by reason whereof said city did not have legal capacity to make the grant to defendant. Nevertheless defendant is giving out that it has legal right to enjoy all the privileges so in form granted to it, and is in process of installing in said city the necessary equipment to that end, thus occupying the territory heretofore exclusively occupied by relator for the purpose aforesaid.

June 24, 1909, relator made due application to the attor-

ney general of the state to prosecute defendant by action of *quo warranto,* in the name of the state, to oust defendant from the franchise and privileges it so pretended to have the right to enjoy, and to exclude it therefrom. Such application was refused.

The prayer of the complaint is that the court inquire by what right defendant holds and exercises the privileges and franchises attempted to be conferred on it by ordinance as aforesaid, and that it be adjudged to unlawfully hold and exercise the same, and that it be excluded therefrom, and relator recover costs and have such other relief as may be appropriate.

Defendant answered, admitting the alleged grant to it of June 7, 1909, and alleging that the grant was lawfully made; that it possessed full right thereto and is enjoying the same, and further answered, respecting the allegations as to surrender of relator's franchise, reception of an indeterminate permit in consideration of such surrender, enjoyment of privileges thereunder formerly possessed referable to the city ordinances, application to the attorney general to prosecute the defendant and refusal to do so, that it had neither knowledge nor information sufficient to form a belief as to whether they were true; and further answered to this effect,—April 19th defendant and the city made a binding contract in writing, whereby the former promised, for a consideration to be paid by the latter, to light the city streets with a specified number of electric lamps of a particular character for a period of five years, commencing August 9, 1909. For the purpose of carrying out such contract defendant has expended a large sum of money in procuring and installing the necessary equipment to do the municipal lighting. At the time of making such contract it was mutually contemplated that an ordinance granting defendant a franchise covering the privileges specified in the ordinance of June 7, 1909, would be passed, an application for which was made when

the contract was closed. Said ordinance was passed accordingly and accepted. At the time of such passage and acceptance the city of Kenosha possessed legal authority in respect to the matter. Defendant claims to possess the right to enjoy all privileges in form granted to it by such ordinance.

Plaintiff demurred to the defensive portion of the answer for insufficiency. The demurrer was sustained.

For the appellant there was a brief by *Quarles, Spence & Quarles,* attorneys, and *H. E. Spaulding,* of counsel, and oral argument by *Mr. Spaulding* and *Mr. T. W. Spence.*

For the relator there was a brief by *Cavanagh & Barnes,* attorneys, and *Van Dyke, Rosecrantz, Shaw & Van Dyke,* of counsel, and oral argument by *Clarke M. Rosecrantz* and *James D. Shaw.*

For the *State* there was a brief by the *Attorney General* and *Russell Jackson,* deputy attorney general, and oral argument by *Mr. Jackson.*

The following opinions were filed January 10, 1911:

MARSHALL, J. The arguments of counsel seem to take a needlessly wide range. They extend to and include important matters which, it is thought, are not within the issues raised by the pleadings. However much counsel may wish to have such matters considered and decided, the court cannot well accommodate them. It is appropriate, and sometimes advisable, to decide each of several major propositions, and from each of several efficient viewpoints; even where the result can as certainly be reached by the decision of a single question upon a single ground. But it will hardly do to go so far as to decide matters not within the issues. These observations will render it unnecessary to give further reasons why some questions, industriously and ably presented by counsel, are not specially herein mentioned.

Do rights, or any of them, claimed by appellant under the

ordinance of June 7, 1909, conflict with those possessed by respondent under its ordinances mentioned in the complaint, and the perpetuating "indeterminate permit," so called, upon which it relies, assuming for now, that the legislation, in regard to such permit, in all respects, is valid, and that such permit affords to respondent all it purports to?

Counsel for appellant, saving all questions within the assumption referred to, seem to concede that there is no conflict as regards the generation and transmission of electric current for heat and power. That is based on the theory that in the granting clause of the ordinance under which appellant claims the right to use the street for the transmission of electric current "for the furnishing of electric heat and power" is expressly included, while, if that feature exists at all in the ordinances surrendered by respondent for its indeterminate permit, it is not found otherwise than in the words "transmission of electricity upon, over, through, under and in the streets, lanes, alleys and public grounds of the city of Kenosha, and to put in place and furnish electric lights for public and private lighting," etc. The idea of counsel is, that the indeterminate permit necessarily coincides with the franchise ordinances surrendered; that the language above quoted does not include a right as to heat and power, and, therefore, that the permit does not, and so, to that extent, appellant's ordinance does not, in any event, conflict therewith. Admitting, for the purposes of the case, that, on the facts stated in the complaint, the scope of the permit is referable to that of the ordinances given in exchange therefor, we are still far from conceding that the result follows which counsel claim.

That the language under consideration is not free from ambiguity, is quite evident. That is indicated by the fact that eminent counsel for the respective parties get a different idea therefrom. Another indication is in the fact that,

whereas as matter of common knowledge when the ordinances were passed, distribution of electricity from central stations for power, was general, it would be highly unreasonable to suppose the grantor and grantee of respondent's franchise did not intend to cover that important feature. There is a third indication in the fact, apparent from the complaint, that respondent's business, under the ordinances, has been conducted for years as including the transmission of electric current for all lawful purposes; and, the ordinance being many years old and the business in the field of selling electric current for power must have become considerable, a pretty strong case of practical construction is presented.

The ambiguity is pretty clearly removed by language following the words of grant. That language provides that, in case of any "other corporation organized for the supplying of electricity for light or power" desiring to use respondent's poles, it shall be permitted to do so on specified terms and conditions. Such language points, quite unmistakably, to the preceding part of the ordinance as having been designed to afford respondent a franchise privilege broad enough to include the power feature.

The words of grant to respondent, in the light of all the circumstances, should be construed to include the ordinary heat and power features of such franchises, and, as respondent's counsel claim, the transmission of electric current for all lawful purposes. The words, "use all public grounds," and in effect, in the ordinary way, followed by the words, "for the transmission of electricity upon, over, through, under and in the streets, lanes, alleys and public grounds," are as broad as the purposes for which electricity is commercially transmitted. What follows, conjunctively, are not words of limitation or explanation, but additional words of grant. "And to put in place and furnish lights for public and private lighting," refers solely to lighting characterized,

to some extent, by placing and caring for lamps in public territory. The city could not confer authority as to placing and furnishing lights for private purposes in private places, and, obviously, none was intended to be conferred. The purpose was to afford the ordinary power to use the street and public places in the ordinary way, for the transmission of electricity for commercial purposes, leaving all matters of use thereof upon private grounds for private purposes, to private treaty; but adding a clause respecting the location and operation of lamps so far as the public was in any wise concerned.

So the situation is this: The rights, in form, of the two parties under their respective public grants, referable to the ordinances and permit referred to, are substantially the same. The purpose of the action is to challenge the right of appellant, under the ordinance of June 7, 1909, to occupy any part of the field covered by respondent's permit, measured by the scope of the surrendered franchises. No other claim of right by appellant is referred to in the complaint or involved in the action. If it possesses, as against respondent, any right under such ordinance, to that extent it must prevail. If it does not, it cannot, regardless of whatever rights it may have otherwise.

It is claimed, on behalf of appellant, that it has, by force of sec. 1780*b*, Stats. (1898), a franchise directly from the state, since such section provides that, "Any corporation organized under general or special law for the purpose of furnishing heat, light, power or signals by electricity may, with the consent of and in the manner agreed upon with the authorities of any city or village, use any street, alley, lane, park, or public ground, for" such purposes upon specified conditions. That is quite an old statute. It does not cut any figure in this case if ch. 499, Laws of 1907, as amended by ch. 180, Laws of 1909, relating to the granting of indeterminate permits in consideration of surrender of existing licenses, per-

mits, or franchises, and the rights of the parties and powers of a city where such an indeterminate permit exists,—is valid, and respondent was in full occupancy of the field in controversy before it was attempted to confer rights on appellant by the ordinance of June 7, 1909. What effect such section might have under other conditions is beside this case.

There is no question but what respondent, May 28, 1909, complied with the law of 1907, as amended by that of 1909, and thereby became entitled to all the benefit thereof as to disability of the city of Kenosha to interfere with its monopoly. The logic by which effect is claimed for the ordinance of June 7, 1909, antedating May 28th of that year, does not appeal to us with sufficient persuasion to call for extended discussion. The ordinance necessarily took effect, so far as it took effect at all, according to the provisions of the city charter, not by contract. There is no provision in the charter whereby retroactive effect could be given by contract to an ordinance. No attempt to do so is disclosed by the ordinance itself. Furthermore, we do not find it claimed in the answer that appellant has, under its ordinance, any rights antedating the passage thereof. Such claim as appellant makes of right to otherwise use the streets for the purposes in controversy, is not material because not a defense to an action having for its sole purpose that of ousting it from the alleged void franchise of June 7, 1909.

The public utility law, in form, in unmistakable terms disabled the city of Kenosha from making such a grant as that in question after respondent's indeterminate permit took effect. It provides that:

"No license, permit or franchise shall be granted to any person, copartnership or corporation to own, operate, manage or control any plant or equipment for the production. transmission, delivery or furnishing of heat, light, water or power in any municipality where there is in operation under an indeterminate permit as provided in this act a public utility en-

gaged in similar service without first securing from the commission a declaration after a public hearing of all parties interested, that public convenience and necessity require such second public utility." [Sec. 1797*m*—74, Stats.: Laws of 1907, ch. 499.]

That is plain. The purpose of it is obvious. The intent was to give the holder of an indeterminate permit, within the scope thereof, a monopoly, so long as the convenience and necessities of the public should be reasonably satisfied, yet to secure to the public the benefit of the monopoly in excess of a fair return upon the investment, under proper administration, by insuring to the consumers the best practicable service at the lowest practicable cost, and to that end prohibit, conditionally, the granting of just such franchises as the one challenged in this case in the circumstances under which the ordinance of June 7, 1909, was passed.

Counsel for appellant reply to the last foregoing by contending that the provision of the public utility law creating a municipal disability to grant such a franchise as that attempted to be conferred on appellant, without the applicant therefor first obtaining a certificate of convenience and necessity as required, is unconstitutional; that the feature requiring the railroad commission to pass on the question of convenience and necessity, was an attempt to grant to it legislative powers.

True, the legislature cannot empower the railroad commission to exercise legislative or judicial power; but it may clothe it with authority to administer a law requiring the ascertainment of facts in order to determine whether the law applies, and if so, how, to situations as they arise. The administrative power includes, necessarily, power to determine the facts necessary to application of the law. That is a familiar principle governing numerous instances of grant of *quasi*-judicial and *quasi*-legislative power. They do not fall

within the field of that strictly judicial or legislative power which is undelegable.

It was said in *State ex rel. Minneapolis, St. P. & S. S. M. R. Co. v. R. R. Comm.* 137 Wis. 80, 117 N. W. 846, with reference to the scope of another feature of the public utility law of the nature of that in question:

"The seat of original power is the legislature. It cannot legitimately delegate it. It can properly clothe a commission with capacity to determine whether corporate rights created by the legislature are exercisable, that depending upon the existence of facts satisfying legal conditions precedent in that regard, and give to the corporation invoking its jurisdiction evidence of its determination."

There is the spirit of the doctrine within which the legislation in question is located.

Here the legislature provided, in effect, that in case of there existing under an indeterminate permit, a right of a corporation to enjoy such privileges as are involved in this case, no other permit or franchise shall be granted to any one to invade, in whole or in part, the same field, except upon a specified condition involving the ascertainment of a fact. That plainly created, conditionally, municipal disability, and to that extent amended all conflicting existing laws. It was the mere ascertainment of the fact that was delegated to the commission. The prohibition of the exercise of power, waiting upon such ascertainment, was of legislative creation. The mere administrative labor of ascertaining the fact, is not legislative power at all in the undelegable sense. Such administrative feature does not involve any element of expediency or legislative discretion, but only the judgment and discretion which any person or body commonly exercises to ascertain whether a given situation satisfies the calls of a rule prescribed by higher authority to a lower for guidance and enforcement. *State ex rel. Adams v. Burdge,* 95 Wis. 390

402, 70 N. W. 347; *State ex rel. Milwaukee Med. Coll. v. Chittenden,* 127 Wis. 468, 107 N. W. 500; *State ex rel. Ellis v. Thorne,* 112 Wis. 81, 87 N. W. 797.

There is no other question which needs attention. The logic of our reasoning is that the order appealed from is right and must be affirmed.

By the Court.—So ordered.

BARNES, J. (*dissenting*). I base my dissent upon the following propositions, which I state without argument to support them:

1. Sec. 1780*b,* Stats. (1898), conferred a franchise directly from the state to the defendant, granting to it the right to use the streets of the city to erect poles therein and string wires thereon subject to the consent of the city to such use and occupation of its streets. *Oconto City W. S. Co. v. Oconto,* 105 Wis. 76, 83, 80 N. W. 1113.

2. By making a contract with the defendant obligating it under a penalty of $25,000 to erect poles and string wires thereon and to have a complete lighting plant in operation in less than four months, the city by necessary implication gave its assent to the use of the streets for such purposes, else it would be impossible for the defendant to carry out its contract obligation with the city.

3. By virtue of sec. 1780*b,* Stats. (1898), and the contract made on April 17, 1909, the defendant secured an indeterminate permit under ch. 499, Laws of 1907 (secs. 1797*m*—1 to 1797*m*—108, Stats.), to place poles and wires in the streets to whatever extent was necessary to enable it to carry out its municipal lighting contract.

4. Sec. 1780*b,* Stats. (1898), was not repealed by sec. 959—49, Stats. (1898), nor by sec. 940*b,* Stats. (1898), nor by ch. 165, Laws of 1907 (sec. 1778, Stats.), nor by ch. 499, Laws of 1907 (secs. 1797*m*—1 to 1797*m*—108). There is no pretense that any of the statutes referred to ex-

pressly repeal sec. 1780*b*. The question of repeal by implication is treated in *State ex rel. Milwaukee v. Milwaukee E. R. & L. Co.* 144 Wis. 386, 129 N. W. 623, and it is apparent under the decisions therein referred to that there was no repeal of sec. 1780*b* by implication.

5. The relator, having surrendered the franchise under which it was operating after the appellant made its contract with the city and before the ordinance of June 7th was passed, received an indeterminate permit to engage in a commercial lighting business, but did not secure any such permit to engage in the business of furnishing lights to the city; so that when the ordinance was passed the relator could lawfully engage in the one species of the lighting business and the appellant in the other.

6. The ordinance of June 7th regulated in detail the conditions under which the streets were to be used by the appellant, the manner of replacing them when torn up, the size of the post holes, the height of the poles, the matter of changing them from one location to another as occasion might require. Omitting the words "and private" from one sentence in the ordinance, every part and parcel of it was a proper and necessary enactment to define the rights and fix the liabilities of the appellant under its contract, and one which the city had the right to pass and the relator had the right to accept.

7. The fact that the appellant had no franchise coupled with municipal consent which entitled it to maintain poles or string wires for the purpose of doing a commercial lighting business, did not render the remaining portion of the ordinance void.

8. The appellant justified its right to insist on the validity of the ordinance because of the indeterminate permit which it held. Its answer set up a perfect defense to the cause of action set forth in the complaint, except in so far as its right to engage in a commercial lighting business was attacked. The answer therefore set up a good defense in part to the

relator's cause of action, and a demurrer thereto should not be sustained and the entire ordinance in effect be declared inoperative, and this without the city being made a party or being given an opportunity to be heard.

9. By the ordinance of June 7th a franchise was conferred on the appellant to erect poles and string wires for furnishing "power and heat." The relator had no right under its franchise to furnish electricity for the purpose of furnishing power or heat, and, when it surrendered its franchise, of course took under its indeterminate permit only such powers as it had under the franchise surrendered. The city had a perfect right to grant the franchise to whomsoever it chose to erect poles and string wires to convey electricity for the purpose of conveying heat and power, and for this reason if for no other the answer states a good defense in part to the relator's cause of action.

10. The appellant is called upon by the relator to show by what warrant it assumes the right to erect poles and string wires thereon in the public streets. It answers by saying in part that it does so by virtue of a valid franchise empowering it to use the streets in so far as may be necessary to light them and to convey electricity for heat and power purposes. In my judgment this answer is true. I am unable to see why it does not state a good defense in whole or in part to the cause of action set forth in the petition.

WINSLOW, C. J., and SIEBECKER, J., concur in the views of Mr. Justice BARNES.

A motion for a rehearing was denied March 14, 1911.

JEFFERY and others, Executors, Respondents, vs. OSBORNE and others, Receivers, imp., Appellants.

November 18, 1910—March 14, 1911.

Railroads: Condemnation of land: Parties: Receivers: Removal of cause to federal court: Appeal: By whom taken: Sufficiency of notice: Law of the case: Evidence: Value of land: Damages for taking: Availability of other lands: Expert testimony: Excessive award.

1. Where, pending a proceeding in a state court to condemn land for a railroad company, the company is placed in hands of receivers in an action in a federal court and such receivers, on their own application, are made parties to the condemnation action, they take that action as they find it, subject to the disabilities of the railroad company, and the case does not become one of federal cognizance so as to entitle them to have it removed to the federal court.
2. Where interests have been acquired in the subject of controversy by legal succession, as in the case of administrators, assignees in bankruptcy, or receivers, the persons acquiring such interests, on being made parties to the action, may prosecute an appeal from a judgment therein adverse to the interests they represent.
3. Where in a condemnation action to which receivers of the railroad company had been made parties defendant judgment was rendered in terms against the defendant company, a notice of appeal by the receivers, properly entitled in the action and giving the date and amount of the judgment but referring to it as being against the "defendants," and an undertaking on appeal describing the judgment as one against the receivers, were sufficient to give the appellate court jurisdiction.
4. Legal propositions upon which the decision of the supreme court was based in the opinion on a former appeal are, whether right or wrong, the law of the case upon subsequent trials or appeals.
5. *It seems*, as an original proposition, that if lack of opportunity for expansion be a proper element to consider in estimating damages to a manufacturing plant a part of whose land is taken for railroad purposes, evidence that other adjoining land was readily purchasable, or was in fact purchased, at moderate cost,

upon which the plant could be enlarged, would be admissible and proper to be considered by the jury to mitigate such damages.

6. But where, upon a former trial, the railroad company procured an option upon adjoining land and tendered it to the owner of the plant to replace the land taken, and the supreme court on appeal from the judgment sustained the trial court's rejection of the offer on the ground that it was not material that plaintiff could move his plant to other land, or, in effect, swap land for the accommodation of the railroad company, the question was foreclosed on the second trial, and proof of the availability and price of adjoining land was not admissible.

7. Experts in the manufacturing business, acquainted from long years of experience with the values and needs of plants of that kind, are competent to testify to the value, as part of a manufacturing plant to which it belonged, of a strip of land taken for the right of way of a railroad company, though having no knowledge at all as to the value of bare land in the vicinity, especially where there is practically no dispute on the question of the value of the strip as mere land.

8. The refusal of the trial court, on motion, to strike out the evidence of a witness on the ground that, in stating the value of a strip taken by a railroad company, he had included damages to the entire tract from which it was taken and had thus duplicated damages, was not a prejudicial error where the verdict was amply supported by the evidence of seven disinterested experts.

9. An instruction to the jury in a condemnation suit that in estimating and determining the fair market value of the strip of land taken they should consider that it was "part and parcel of and used in connection with the tract and premises of the plaintiff," also the "use to which it was in whole or in part devoted," and "the uses to which it was or was intended by the owners in the immediate future to be applied," was not improper as permitting the jury to duplicate damages. *Jeffery v. C. & M. E. R. Co.* 138 Wis. 1, distinguished.

10. It is settled law in this state that in awarding damages for the taking of land for railroad or highway purposes the strip taken is to be valued as part and parcel of the entire tract of which it formed a part; that the landowner is entitled to recover the difference between the fair market value of the whole property before the taking and the value of what remains after the tak-

ing; and that the actual use and intention of the proprietor is to be considered as well as the adaptability of the property for some other use in future.

11. In a proceeding to condemn land for a railroad, the juries in two successive trials having awarded substantially the same amount of damages, which, though large, is supported by ample evidence, the court declines to interfere on the ground that the award is excessive.

MARSHALL, J., dissents.

APPEAL from a judgment of the circuit court for Kenosha county: E. B. BELDEN, Circuit Judge. *Affirmed.*

The facts so far as they are essential are stated in the opinion.

For the appellants there was a brief by *Quarles, Spence & Quarles,* attorneys, and *T. W. Spence* and *J. V. Quarles, Jr.,* of counsel, and a separate brief by *Jackson B. Kemper,* of counsel; and the cause was argued orally by *Mr. J. V. Quarles, Jr., Mr. Spence,* and *Mr. Kemper.*

For the respondents there was a brief by *Thomas M. Kearney* and *James Cavanaugh,* and oral argument by *Mr. Kearney* and *Mr. W. D. Thompson.*

The following opinion was filed January 10, 1911:

WINSLOW, C. J. This is a proceeding by an electric railway company to condemn a strip of land 100 feet in width running through the manufacturing plant of the respondents at Kenosha. The case was once here upon an appeal from the verdict of a jury fixing the damages at $125,000 (*Jeffery v. C. & M. E. R. Co.* 138 Wis. 1, 119 N. W. 879), and the judgment was reversed and the action remanded for a new trial. While the case was pending here the railway company was placed in the hands of receivers in an action in the federal courts, and upon return of the case to the trial court such receivers were made parties defendant on their own application. A second trial resulted in a general verdict for

the plaintiffs, assessing the damages at $133,000. From judgment against the railway company upon this verdict the receivers have appealed.

Some preliminary questions are raised which will be first considered.

Immediately after the order made by the trial court admitting the receivers as parties to the action, they presented a petition for the removal of the case to the United States court on the ground that the case became one of federal cognizance, such receivers being officers of the United States and the matter in litigation involving property in the hands of such receivers. This application was denied and, as we think, rightly so.

The receivers came into the action not as necessary parties thereto, but simply as proper parties to maintain and defend the property rights which had been placed in their hands. They succeed to the interests of the railway company, but their rights in the case are no broader than the rights of the corporation itself. They take the suit as they find it, subject to the disabilities of the party whose interests they represent. Their presence raises no question of federal cognizance. *Speckert v. German Nat. Bank,* 98 Fed. 151; *Gableman v. P., D. & E. R. Co.* 179 U. S. 335, 21 Sup. Ct. 171.

The judgment in the case was rendered in terms against the railroad company, and further provided that, upon payment into court of the amount of damages awarded, the exclusive use of the condemned premises should vest in the company for railroad purposes. The notice of appeal was entitled in the case, giving the names of both the company and the receivers as defendants, and gave notice that the receivers appealed from the judgment "rendered by the circuit court of Kenosha county in the action above entitled, entered on the 30th day of November, 1909, in said court in favor of the plaintiffs *and against said defendants.*" The undertaking accompanying the notice also described the judgment as

one recovered against the receivers. Upon these facts the respondents now claim, *first*, that the receivers have no right of appeal, and, *second*, that they have not in fact taken an appeal.

Both contentions must be overruled. As before stated, the receivers were proper parties to the action. By their order of appointment they were required to take possession of the property of the defendant corporation, manage its business, and prosecute and defend all such actions as might be necessary or advisable for the proper protection of the property and the trust vested in them. It was plainly their duty to defend these proceedings, and just as plainly their duty to take an appeal from the judgment if, in the exercise of a reasonable and sound discretion, it seemed that prejudicial error had occurred, by reason of which the amount of the award had been increased. The strip in question had been taken possession of by the railroad company and $50,000 had been paid into court by the company as damages, being the amount awarded by the commissioners. The rights of the company in the strip were valuable and it was essential that those rights be protected by the receivers. As to the right of the receivers to appeal from the judgment there can be no serious question. The general rule is that where interests have been acquired in the subject of the controversy by legal succession, such as the interests acquired by administrators, or assignees in bankruptcy, or receivers, the persons acquiring such interests may, on being made parties to the proceeding, prosecute an appeal from a judgment against the party whose interests they represent. Elliott, Appellate Procedure, §§ 133, 137.

As to the form of the notice and undertaking on the appeal there is doubtless something to be desired. The judgment was not described with exact legal accuracy in either paper; nevertheless there was no possibility of mistake. The action was correctly entitled, and the dates and amount of the judgment properly given. It was called in the notice a judg-

ment against the "defendants" and in the undertaking a judgment against the receivers, naming them in their official capacity. In legal effect the judgment might properly be said to be a judgment against the receivers in their official capacity, because while it did not bind them personally it was adverse to the interests of the trust which they represented and were bound to protect and defend, and in this sense was a judgment against them. In any event there could be no question as to the judgment which was referred to in the appeal papers, and the verbal inaccuracy, if any there was, in the notice and undertaking cuts no figure.

We pass now to the merits of the appeal. The piece of land which has been condemned here is a strip 2.3 acres in extent and is 100 feet wide and 1,013 feet long north and south, running through a large automobile manufacturing plant. While it took no substantial buildings, it separated the principal buildings of the factory on the east from the testing track on the west and took space upon which a building had already been begun. The factory was situated in the outskirts of the city of Kenosha and there was vacant land to the west and to the north. The witnesses for the plaintiff, who placed the damages at somewhere from $125,000 to $200,000, all testified that opportunity for expansion had much to do with the value of manufacturing plants and sites, and the testimony was further to the effect that by the taking of this right of way the opportunity of expanding the factory upon the premises owned by the plaintiffs on the west was very seriously impaired, if not practically destroyed. The plaintiff Thomas B. Jeffery himself testified that after the condemnation proceedings were commenced he had purchased lands immediately north of his buildings and east of the right of way, comprising something less than thirty acres, at $1.100 to $1,200 per acre, and that he also purchased a block of land on the east of his factory for $24,200. Upon these premises so purchased he had erected additional factory

buildings and thus expanded the plant. It was also admitted on the trial that at the time of the taking vacant land could be bought immediately north of the plaintiffs' buildings for $1,100 to $1,200 per acre.

Mr. F. L. Mitchell, being called as a witness for the plaintiffs, testified that in his opinion the plaintiffs' plant was worth $500,000 before the taking of the strip in question and $350,000 to $375,000 immediately after the taking, and that opportunity for expansion had much to do with the value. Upon cross-examination Mr. Mitchell was asked the following question in several different forms and upon objection the evidence was excluded:

"*Q.* Now, I desire to ask you whether the fact that to the north and south and east there were other available lands purchasable at approximately the market value of suburban lands, say a thousand dollars, or thereabouts, an acre, would not make a material difference in the valuation that you would put upon this plant before and after the taking?"

The same question was also raised in a different form by the refusal of the court to give to the jury the following instructions which were requested by the defendant:

"3. While you may not take into consideration the price, or the opportunity of acquiring adjoining land for any contemplated extension of the plant, in mitigation of damages, you may consider the same as bearing upon the market value of the plant; that is to say, the existing opportunity of acquiring land for additional buildings and for piling and storing lumber and other material may be considered by you, applying the evidence of such opportunity and of the cost of such additional land solely to the question of the decrease in the market or salable value of the remainder of the plant, and to aid you in weighing the opinion testimony of witnesses as to the lessening of the market value of the part not taken, by the taking of the strip."

"8. You may consider the expansion and enlargement of the plant since the taking and the manner in which the same has been accomplished as evidence of the capacity for such

enlargement immediately after the taking, and the availability of particular portions of the tract for improvements incidental to such expansion, as bearing upon the question of the lessened value of the part not taken caused by the taking of the strip in question and the opinions of witnesses given thereon."

"12. In determining the diminution, if any, in market value of the property not taken by the taking of the strip, if you determine that any diminution in value was occasioned by lack of opportunity for expansion of the plant, you may consider the market value of adjacent lands and the amount thereof suitable for the uses of the plaintiffs and the amount thereof obtainable by the plaintiffs as an element in determining the amount of such diminution of market value and as bearing upon the weight to be given to the opinion of witnesses as to the diminution of the market value of the property not taken."

The instructions given by the court touching this question were as follows:

"In the examination of certain of the witnesses questions were propounded which included reference to parcels of real estate lying outside of the lands owned and occupied by the plaintiffs March 3, 1906. In reaching your determination in this case you will not consider the availability, if any, of lands outside of the lands in question owned by the plaintiffs March 3, 1906, or that such outside land might have been acquired by the plaintiffs, or that they have since acquired any such lands. Such matters may not be shown or considered in this case for the purpose of reducing the compensation to which the plaintiffs are entitled. The owners were not required to move part of the plant to other lands for the accommodation of the defendant railroad company. The compensation to which the owners are entitled is to be based upon the conditions as they are proven to have existed March 3, 1906, before the taking of the strip, and after the taking of the strip. The evidence offered and received in this case as to the then market value of land in the immediate vicinity of the tract owned by the plaintiffs may be considered by you in determining the value of the parcel taken by the railroad company, and the damage, if any, to the remain-

der of the land of which such tract taken formed a part on the 3d day of March, 1906, and in considering the weight and value to be given by you to the opinions expressed by the several witnesses."

All of these rulings raise the same question, namely, whether the admitted fact that other adjoining land was readily purchasable upon which the plant could be enlarged was a proper fact to be considered by the jury in estimating the damage to plaintiffs' property, in view of the testimony to the effect that lack of opportunity for expansion had much to do with the estimates of value of such property.

As an original proposition we should find it very difficult, if not impossible, to sustain the rulings of the trial court. If, as the witnesses testified, the damages would be enhanced because opportunity for expansion of the works was impaired or destroyed by the taking of the strip, it would seem logically to follow that the fact that the opportunity for expansion still existed by the expenditure of a comparatively insignificant sum of money would have a vital bearing on the question of the amount of the damage, *i. e.* reduction in market value suffered by the remainder of the plant.

It seems, however, that we cannot approach the proposition upon first principles. A very similar question was presented to the court and considered upon the first appeal, and whatever legal propositions were laid down upon that appeal form the law of the case upon all future trials or appeals, whether those propositions be right or wrong. Upon the first trial the subject was approached from a somewhat different standpoint. The taking of the strip encroached upon the east side of the circular testing track, making it necessary to shorten the track somewhat and increase the sharpness of the curves, and the defendant procured from the owner of land on the west an option for the purchase of a strip of land equal in size to the strip taken for a moderate price, which would enable the plaintiffs to duplicate their previous testing track. This op-

tion the railroad company tendered to the plaintiff with an assignment thereof and offered to prove these facts upon the trial. Upon objection the offer was rejected, and this ruling was one of the errors claimed upon the former appeal.

In treating the question this court then said:

"The obvious purpose of this offer was in mitigation of damages. The fact that other lands in the immediate vicinity could be purchased from a third party at a moderate price, to which plaintiff should shift his business, could not be shown to reduce the damages to which plaintiff was entitled. It is not material that he could move part of his plant to other land for the purpose of giving the appellant a right of way, and thus, in effect, swap land for the accommodation of appellant. . . . The only relevancy such an offer could have, if admissible for any purpose, would be as tending to prove the value of land in the immediate vicinity of plaintiff's plant on the question of value of the land taken and damages to other land." [138 Wis. 14.]

It is true that some further reasons are given in the opinion as additional grounds for the holding that the offer of proof was properly rejected, but the ruling is squarely rested upon the legal proposition above quoted as well as upon the other subsidiary grounds, and that proposition must necessarily be considered as settled in this case. That proposition is that the fact that other lands could be purchased in the immediate vicinity to which the plaintiff might shift his business could not be shown to reduce the damages, but might probably be shown on the question of the value of the land taken and damages to other land. If this be the correct meaning of the former opinion, then it is quite apparent that the court's rulings on the second trial were in accord with the principles there laid down, which principles are the law of the case.

In charging the jury the trial court told them plainly that they were not to consider the availability of lands outside of the lands owned by the plaintiffs at the time of the taking, for

the plaintiffs were not required to move any part of their plant to other lands for the accommodation of the defendant and their compensation must be based upon the conditions existing at the time of the taking; but that evidence of the value of adjacent lands might be considered in determining the value of the parcel taken and the damage to the land not taken.

We are not to be understood as approving of these propositions as independent legal principles, but simply as holding that the rulings are in substantial accord with the rules laid down by this court in the former opinion and which are conclusive so far as this case is concerned.

The foregoing question is the question which was mainly discussed upon this appeal, but there are some other questions raised which will be briefly considered.

It is said that the witnesses who testified as to the value of the plant before and after the strip of land was taken did not qualify themselves to testify as experts. It is true that a number of them were witnesses who lived in Racine and they did not claim to have knowledge of the value of land as land in that vicinity. If the question at issue had been the mere question of the value of land which had no value except for residence or farming purposes, they clearly would not have been qualified witnesses. But this was not the question. There was practically no dispute on the question of the value of the strip as mere land. The plaintiff fixed its value at about $1,100 per acre and no one disputed him. The question was as to the value of the strip as part of the manufacturing plant conducted by the plaintiff, and this was the question upon which these witnesses testified. They showed themselves to be experts in the manufacturing business and well acquainted, from long years of experience, with the values and needs of plants of this kind. It also appeared that they knew, by examination of the property at or very soon after the time when the land was taken, what its situation,

condition, and general adaptability to the plaintiff's business was. This knowledge, we think, qualified them to testify as experts on the question of the value of the manufacturing property before and after the strip was taken, especially in view of the fact that there was no serious controversy as to the value of the land taken considered merely as land not connected with any industry.

George Yule was called as an expert witness for the plaintiff on value. He testified that the value of the plaintiff's plant before the taking of the strip was $600,000 and after the taking was $425,000. He further testified that in considering the reduction in market value which would accrue to the part of the plant left on the east of the track he considered the fact of its not being able to extend. Being asked as to the market value of the strip taken, he stated that it was $50,000, and upon cross-examination that he considered as elements which went to make up this value "the matter of extension of the plant and the growth of the business" and the difficulty and expense of proper supervision in case the plant was extended across the tracks, making two separate plants.

The defendant then moved to strike out Mr. Yule's testimony as to the value of the strip on the ground that he manifestly included in his estimate of value damages to the entire tract and thus duplicated damages, but the motion was denied. It may be possible that, under the rules laid down in the former opinion as to the duplication of the elements of damage, the defendant's motion should have been granted, but we do not find it necessary to decide this question. Even should this be admitted, it does not seem to us that any substantial prejudice resulted from the denial of the motion. Seven disinterested witnesses testified in the case as to the damage to the property by the taking of this strip for railroad purposes, and all but one had placed the damage at somewhere from $150,000 to $200,000, while the remaining witness had

placed it at $125,000 to $150,000. The idea that the striking out of the testimony of one of these witnesses as to the value of the part taken would make any substantial difference in the result of the jury's deliberations seems in the highest degree improbable. We therefore conclude that if there was error in the ruling it was nonprejudicial.

The court charged the jury in reference to the value of the strip taken as follows:

"In estimating and determining the fair market value of the strip or parcel of land taken by the railroad company you will consider the fact that said strip of land was part and parcel of *and used in connection with the tract and premises of the plaintiffs,* described in the evidence, and you will not view the parcel taken as an isolated or separate parcel of land. You will further consider any and all evidence relating to the situation of said strip, its general location with reference to the remainder of said plaintiffs' premises, its surroundings, *the use to which it was, in whole or in part, devoted,* its availability and adaptability for valuable uses, its natural advantages, if any, arising out of its location and situation, *the uses to which it was or was intended by the owners in the immediate future to be applied,* and all the other evidence, facts, and circumstances introduced and appearing upon the trial which will aid you in arriving at a just determination of said value."

The appellant contends that this instruction allows the jury to duplicate damages and is in direct violation of the law laid down in the opinion of the court upon the former appeal. At first blush the contention seems to have weight, but we think that when the former opinion is carefully studied in connection with the peculiar questions which arose in that case it will be found that there has been no departure from the established law either in that opinion or in the charge now objected to.

Upon the first trial the case was submitted to the jury upon two special questions, instead of upon a general verdict as was done upon the second trial. The first of these questions

asked what was the market value of the strip taken considered as a part of plaintiff's entire tract as used in his business; and the second asked in what amount was the fair market value of the remainder depreciated by the taking of the strip. It was considered that as these questions were framed they necessarily involved and demanded of the jury answers duplicating in some degree the damages. It was said in substance that the value of the strip as a part of the premises used in the plaintiff's business must include deterioration in whole or in part of the remainder of the plant, and hence the same element was included in both questions and the sum of the answers must duplicate some part of the damages. It was clearly not intended to overrule or change the law governing the elements of damage in condemnation cases, for the cases which amply justify the charge of the trial court which is now attacked are cited upon page 17 of the opinion on the former appeal. Really the only point decided was that the form of the questions rendered duplication of damages inevitable, although some language in the opinion may seem to justify the idea that the decision goes further.

Since a very early day in this state it has been very well settled that in awarding damages for the taking of lands for railroad or highway purposes the strip taken is to be valued as part and parcel of the entire tract of which it formed a part; that the landowner is entitled to recover the difference between the fair market value of the whole property before the taking and the value of what remains after the taking; that the actual use and intention of the proprietor is to be considered as well as the adaptability of the property for some use in the future. *Welch v. M. & St. P. R. Co.* 27 Wis. 108; *Driver v. W. U. R. Co.* 32 Wis. 569; *Watson v. M. & M. R. Co.* 57 Wis. 332, 15 N. W. 468; *Meinzer v. Racine,* 74 Wis. 166, 42 N. W. 230; *Washburn v. M. & L. W. R. Co.* 59 Wis. 364, 375, 18 N. W. 328; *Alexian Brothers v. Oshkosh,* 95 Wis. 221, 70 N. W. 162; *American States S. Co. v. M. N. R. Co.* 139 Wis. 199, 120 N. W. 844.

These cases, except the last, were in mind when the former opinion was written, as is demonstrated by the fact that a number of them were cited in the opinion, and had there been any intention of departing from them that intention would have been clearly expressed.

It is evident that the charge of the court now attacked was in substantial conformity with the law as settled in numerous decisions, and that law, not having been disturbed by the opinion on the previous appeal, is controlling here and entirely justifies the charge.

It is claimed that the damages are excessive. Were this the first verdict we should feel some hesitancy in sustaining it, but there have now been two verdicts of substantially the same amount in this case by juries whose fairness is in no way impeached. There was ample evidence upon both trials justifying the finding of the large amounts which the two juries have found. We see no reasonable probability that another trial would result differently, nor do we feel that there is any amount which the court can say that the jury should have found rather than the one which they actually did find.

By the Court.—Judgment affirmed.

The following opinion was filed February 8, 1911:

MARSHALL, J. (*dissenting*). I think fatal error was committed in holding that evidence of there being ample opportunity for respondents to purchase land adjacent to the manufacturing premises for use in expansion of the business was not admissible as bearing on damages to the property not taken, and, further, in refusing to instruct the jury that evidence of such opportunity was proper for consideration on such question. If the premise upon which my brethren grounded their decision be correct the conclusion is correct also. My judgment is that their reasoning was from a wrong premise; *first,* because the question at issue was ex-

pressly excluded from the former opinion instead of being passed upon in favor of respondents; *second,* if such question were not so excluded the former opinion is certainly very ambiguous in respect thereto and, therefore, should be construed in favor of a theory which will not convict this court of making what all now agree would be, as an original matter, a clearly wrong and exceedingly unjust decision. For myself, I have no hesitancy in saying that I had no idea upon the former occasion of agreeing to a conclusion such as the court now reads from the opinion then rendered. I filed a dissenting opinion with reference to one vital question, treating the matter at considerable length. I did not mention the subject in hand because, as I read the opinion, so far as the subject was touched upon, it was in favor of the position taken by appellants on the second trial. That I gave careful attention to the language used before, must be supposed from my analysis of that part treating of the measure of damages, about which I will speak later. Certainly I would not have allowed the decision on the other point, now confessed to be wrong, pass without vigorously protesting, had I understood it as the court now does, but would have discussed the matter fully in the opinion which I wrote.

On the first appeal it appeared that at the trial defendant offered proof in mitigation of damages, by showing it had an option, which was at plaintiff's disposal, to purchase a tract of land adjacent to the manufacturing plant and suitable for extension thereof; that the optioned land was purchasable at a low price compared with the value claimed for land taken and damages to the land not taken. The court on the second trial interpreted what was said in the opinion as to the rejection of that offer as holding in such a case that proof of the market value of land available in place of the land taken is not admissible either as bearing on the value of that taken or damages to the land not taken. As indicated, while there is, as I understand, unanimity of thought that such doctrine,

from an original standpoint, is wrong, my brethren confess it was written into the former opinion and so the court is powerless to correct it now.

To determine correctly what the court on the former occasion intended to decide we must start by facing the proposition it assumed to be dealing with. That can best be appreciated by this language of the opinion whereby the attempt was made to concisely state the matter:

"The obvious purpose of this offer was in [*note the language*] mitigation of damages. The fact that other lands in the immediate vicinity could be purchased from a third party at a reasonable price, to which plaintiff should shift his business, could not be shown to reduce the damages to which plaintiff was entitled. . . . What has been heretofore said applies here as to the tender [*note the term again*] *in mitigation of damages,* which it was obviously offered for. *The only relevancy such an offer could have,* if admissible for any purpose, would be as *tending to prove* the value of land in the immediate vicinity of the plaintiff's plant on the question of *value of the land taken and damages to other land.*"

It will be seen the court, industriously, distinguished between proof *"in mitigation of damages"* and proof bearing on the *value of the land taken and damages to the other land.* It then proceeded to hold that, as an offer "in mitigation of damages," it was incompetent under any circumstances, and that as to the other purpose, not intended by the offer, it was properly rejected for reasons stated, which were curable. The distinction between the two phases of the matter was evidently attempted to be emphasized.

As to the first phase mentioned, the court characterized the offer as an attempt to compel the plaintiff to submit to an offer to "swap land for the accommodation of appellant" and thus mitigate damages. Turning to the other phase it was remarked that, "The only relevancy such an offer could have, if admissible for any purpose, would be as tending to prove the value of the land in the immediate vicinity of plaintiff's

plant on the question of value of the land taken and damages to the other land," plainly suggesting that for such purpose (note that such was the identical purpose we now have under consideration) evidence of the purchasable value of adjacent available and suitable land might be received.

As it seems to me the court thus, industriously, even if somewhat ambiguously, reserved the question as to whether such evidence for such purpose was relevant. Having done so the court proceeded to show that the evidence was not relevant for such purpose under the circumstances of the offer, so confining the discussion to that as to leave the matter in reserve as to whether, with infirmities removed, the evidence would have been relevant, and, at least, without casting any doubt on the question, and, in a reasonable view, suggest that it might.

"But," says the opinion, "the offer was not competent on the question of value of the land embraced in the option;" because it "was not supported by any sworn testimony." "The contents of the option were not made known, except by a general statement." It "was not offered formally, so that counsel could examine it, so far as we can discover from the record. Nor does it appear that the option was in force when the offer was made."

Summarizing somewhat, the foregoing is followed thus:

"It is very obvious that it would be a dangerous rule to allow an adverse party, for the purpose of establishing the value of land, to put in evidence a writing purporting to be an option to sell at a named price, without any other proof verifying the facts stated in the option. This would, in effect, be to allow the appellant to make proof by declarations of third parties, not under oath."

Did not that by reasonable, if not necessary inference, suggest that proof of the value, for the purpose in contemplation here, was proper, though the manner of proof in the then situation for the particular reasons mentioned was improper?

The discussion in the opinion was closed by conclusions in strict harmony with what we have said. Note the language of such closing: "The offer made . . . had no materiality, because . . . appellant could not transfer interests or rights *in lands in mitigation of damages,* and it was not competent on the question of value of the land therein described or in the vicinity." That is, it had no materiality in any event, on what the court referred to as "in mitigation of damages" and was not competent on the other question, that of the "value of the land taken and damages to the other land," because, under the circumstances the court had referred to, going to avoidable infirmities in the offered proof, it was not competent to show the value of the land described in the option. Not being competent therefor, of course, it was not as bearing on the ultimate fact in controversy. It was, in that respect, as if a witness to prove value were interrogated in respect to the matter in advance of proper proof in respect to his competency to testify on the question.

From the foregoing does it not appear quite plain that the court before did not intend to decide that, in a case of this sort, proof of the market and purchasable value of adjacent suitable land for the business disturbed by the invasion and deprivation in controversy, is not competent on the subject of "value of the land taken and damages to other land?" It does to me, and I wish as emphatically as possible to wash my hands of any intention of having been a party to making a decision now conceded to be wrong, and from which seemingly flows a decision conceded to be unjust in fact if right in law.

Was I derelict before in thinking that the opinion would be construed as I contend now it should be, and so neglecting to treat the subject in my independent opinion, as I did the other dominating one, endeavoring to escape responsibility for a seemingly radical departure from the settled law in respect to the latter, which we are now happily agreed would

have been such departure, a way of escape from the dilemma I did not share in creating being found by treating that part of the opinion on the subject of measure of damages as ambiguous, and reading out of the obscurity a statement of the law in conformity to the views I then expressed? If I were so derelict then, looking at the language I have analyzed fairly; in the most favorable aspect it will reasonably bear for respondents, is it not ambiguous, permitting, reasonably, of the meaning I read out of it being easily discovered therein? If so, then why does not the rule which applies to the construction of contracts and statutes govern, viz.: of two reasonable meanings, one that is consistent with the law and will lead to a just result, and one that will render the contract or statute unlawful or lead to some unjust or some absurd result, the former should be adopted? I think these questions should be answered in favor of appellants instead of, unnecessarily, as it seems, confessing that the court wrongly decided an important question on the former appeal and inflicting the consequences thereof on the appellants on this appeal. I do not doubt but what my brethren would fully agree with me in answering my last proposition in the affirmative. Where we differ is in respect to the others.

The instructions given on the last trial indicate to my mind. very clearly, that the trial court understood the subject under discussion was treated before in two aspects, as I have indicated, in one proof of the market value of outside available land being thought improper and in the other not so. Endeavoring to cover the first phase, supposed to involve whether plaintiff could be compelled to swap land in "mitigation of damages," the judge said:

"Such matters may not be shown or considered in this case for the purpose of reducing the compensation to which the plaintiffs are entitled. The owners were not required to move part of the plant to other lands for the accommodation of the defendant railroad company."

Directing attention to the other phase of the matter the court added:

"The evidence offered and received in this case as to the then market value of the land in the immediate vicinity of the tract owned by plaintiffs may be considered by you in determining the value of the parcel taken by the railroad company, and the damage, if any, to the remainder of the land of which such tract taken formed a part."

That was the very purpose for which the rejected evidence was offered, not in "mitigation of damages" as the term was used in the former opinion. The rejected requests were phrased accordingly. The purpose thereof was to inform the jury that proof of opportunity to obtain suitable adjacent land and the probable cost thereof while not to be considered "in mitigation of damages" were in determining "damages to the other land." It seems that the ambiguity in the former opinion was exaggerated by the trial judge, leading him to confuse the two ideas and so reject evidence plainly competent for one purpose, mistaking the offer thereof to be for another, and, not appreciating the somewhat shadowy distinction apparent from the facts of the former case there made between proof "in mitigation of damages" and circumstantial proof of the actual damages made in the way attempted, he got the idea that circumstantial proof thereof was not permissible. That is the only key I can see to unravel the obscurity in the charge. Looking at the language thereof and the ruling the charge seems fatally contradictory. Looking at the quoted language alone last referred to it seems in harmony with the spirit of the rejected instruction, but applying it to the rejected evidence and the case in general in the light of the former opinion, it seems the judge was of the opinion that this court held that the lessened value of land not taken caused by taking a part of the entire tract could not be established circumstantially. I insist that there is

nothing in the former opinion necessarily requiring that view.

For the reasons stated I think the judgment should be reversed. There is at least one other reason which of itself calls for the same result. I think the trial court, though as an original proposition giving the law to the jury correctly, violated the law of this case in instructing, as he did, on the measure of damages. The instruction is quoted in the opinion of the court. As I read it, counsel for appellants are right in the contention that the law as there stated is condemned in the former opinion. That condemnation was the occasion for my labor in writing the quite lengthy independent opinion, hoping to prevent any permanent departure from long settled rules. While I still think I took the right view of the opinion and the one the bench and bar in general have read out of it, if it be otherwise, and the difficulty was only in stating ambiguously a correct rule, then I quite agree that the meaning which will render what was said harmonious with previous adjudications on the subject, if to be found in the language used, should be adopted rather than one which will not. So, on the whole, I am content to unite with my associates in treating the former opinion as not overruling previous cases on the subject of damages. I am so content, particularly, as to what the court really intended, because soon after the opinion was filed *American States S. Co. v. M. N. R. Co.* 139 Wis. 199, 120 N. W. 844, and *Krier v. M. N. R. Co.* 139 Wis. 207, 120 N. W. 847, were decided, in which the law was stated as in my independent opinion in this case, all the justices concurring.

I have given considerable attention in this opinion to the logic with which I heartily concur, enabling the court to construe one ambiguous feature in the former opinion in harmony with settled principles, thus saving the judgment from reversal. But why the same logic does not also apply to the other ambiguous feature, thus avoiding the result of

affirming a judgment which is wrong from an original viewpoint, upon the ground that wrong has been made right by a previous wrong decision, I am not able to understand.

A motion for a rehearing was denied March 14, 1911.

BURNS, Plaintiff in error, vs. THE STATE, Defendant in error.

November 21, 1910—March 14, 1911.

Criminal law and practice: Jurors: Competency: Challenge: Review of decision: Instructions to jury: Undisputed facts: Bailment: Larceny by bailee: Misconduct of jury: Reading newspapers: Witnesses: Competency: Insane persons.

1. A juror in a criminal case is not necessarily incompetent merely because he has an impression or opinion as to the merits of the case, formed from reading newspaper accounts and from other hearsay information.
2. On a challenge in such case the question of competency is one of fact to be determined by the trial court in view of all the evidence and the mental characteristics of the juror appearing from his examination.
3. A decision of the trial court holding such a juror competent will not be held erroneous unless clearly shown to be wrong or an abuse of discretion; but, generally speaking, the practice is to be commended which excuses the juror in such a case.
4. A court may in a criminal case, as in any other, instruct the jury respecting facts established by the evidence beyond any room for reasonable controversy, and when such evidentiary facts exist establishing beyond any room for reasonable controversy an essential of any ultimate conclusion sought, it is not a harmful error, if error at all, to treat such essential as having been proven.
5. The possession of a bailee and his duty to account for the property need not be based upon a contract *inter partes*, but may result from the operation of law.
6. A constable who, upon taking an insane man in charge after a pursuit, received from one of the pursuers a roll of money which had been thrown away by the man in his flight, became

thereby a bailee of such money; and where such facts were undisputed upon the trial of the constable for larceny of the money under sec. 4415, Stats. (1898), the court properly instructed the jury that if the accused converted any of such money to his own use he did so as bailee.

7. Sec. 4415, Stats. (1898), abolishes the distinction between conversion by a bailee of an entire thing and the unlawful breaking of a package and conversion of part or all of the contents, each of such acts differing from ordinary larcenies by the absence of the element of trespass in gaining original possession; so that where the evidence shows the breaking of a package of money and the extracting therefrom of a part of the contents, acquittal of the accused under a count charging larceny of the money is not inconsistent with his conviction, under another count, of the statutory offense of larceny by a bailee.

8. Misconduct of the jury, after the panel had retired, in getting possession of a newspaper and reading therein an account of their deliberations, and misconduct of the officer in charge in permitting the jury to get possession of such paper, do not call for a reversal of the judgment unless it appears to this court that, had the improper conduct not occurred, the result might, within reasonable probabilities, have been different.

9. Such misconduct, as well as the misconduct of the newspapers in publishing the secrets of the jury room, are highly reprehensible and should be rebuked or punished by trial courts.

10. A person is not necessarily incompetent to testify because of impaired mental condition at the time of the occurrences in question. Whether he is so mentally infirm as not to be entitled to testify at all is a question for the trial court, and its decision in favor of receiving the testimony for what it is worth cannot be disturbed unless manifestly wrong, as where the infirmity is total or such as to render the person wholly unconscious of the obligations of an oath.

ERROR to review a judgment of the circuit court for Racine county: E. B. BELDEN, Circuit Judge. *Affirmed.*

The accused was duly informed against in two counts, *first,* as having committed the crime of larceny of $400 in lawful money; *second,* as having, while in the possession of $400 of lawful money as bailee, feloniously converted the same to his own use. The owner of the money was alleged, in each count, to be Paul Adamsky.

Such proceedings were had that the accused was, in due form, found guilty on the second count and not guilty on the first. Judgment was rendered accordingly.

The evidence proved, or tended to prove, this situation: Adamsky, who was somewhat insane, May 6, 1909, had upon his person $602.75 in money, mostly in $5, $10, and $20 bills which he had drawn from the bank at Two Rivers on that day. Five hundred dollars of the money was in a package wrapped in a paper as he received the same from the bank. He stayed at Two Rivers till the evening of the next day, spending the night at home with his family. He did not count his money after he left the bank. On such evening he went to Manitowoc on a street car. He remained there through the night in the depot, and then left by railroad train for Indiana. He was suffering from a delusion that some one was trying to get his money. He went about in his half-crazed condition for some three days when he brought up at Corliss on a railroad train which came in from the south. As the train drew in to the station he jumped out of the car window and fled easterly toward an intersection of the Chicago, Milwaukee & St. Paul track with the Chicago & Northwestern track, about a mile east of Corliss where there was a switch and signal tower. Several, including one Kasdorf, pursued him. Before reaching the tower he made a motion as if taking something from his coat pocket and throwing it away. Upon arriving at the tower he drew his revolver on the tower man, but without discharging it put it up and fled toward Milwaukee on the Chicago & Northwestern track. The tower man with a track bicycle accompanied by Kasdorf followed. Soon they saw Adamsky lay something down on the track, which proved to be a roll of money. Kasdorf possessed himself of the roll and they delayed further pursuit for a moment while he partially counted the money. Before finishing they again started in pursuit of Adamsky who they had concluded was insane. This part of the pursuit was

made on foot and away from the track, the tower man being in the lead. He finally came up with Adamsky and was soon joined by Kasdorf. The latter asked Adamsky if the money was his. Adamsky replied that he did not want it. *Thomas Burns,* a constable, and others who had pursued the fleeing man from Corliss, came up, whereupon Kasdorf handed the package to *Burns* in the condition it was in when he stopped counting, as aforesaid. *Burns* put the roll in his pocket. He then took Adamsky in charge and, in due course, placed him in custody of the sheriff of Racine county at the city of Racine, asking the sheriff to telephone Adamsky's wife that upon her coming to Corliss he would turn over her husband's belongings. He then returned to Corliss taking with him the roll of money and things he had obtained from Adamsky's person. He said at the jail that he had obtained $15 or $17 of Adamsky's money. He did not know himself then the amount as he had not fully counted the money. Later he made as an excuse for understating the amount that he did not care to have people know how much money he had on his person or about his premises. He searched the next day along the track for money reported to have been thrown away by Adamsky, other than the package, but did not find any. Several days after he received the roll of money, the sheriff, because of hearing there was more than he heard the accused reported, visited him in respect to the matter. On this occasion *Burns* delivered to the sheriff $200, obtaining it from the barn, as all Adamsky's money which had come to his possession. He claimed that he counted the money upon reaching home after delivering Adamsky to the sheriff; that the bills were wrapped with some pasteboard in a form to disguise the amount; that they were wet; that he spread them on a girder in the barn to dry, and that before retiring for the night he went thereto, gathered up the bills, put them in a glass milk jar, threw it in the manger and covered it up with hay, where it remained, as he said, till he sought therefor to

make the delivery to the sheriff. He accounted for the peculiar way of safeguarding the money to have been adopted to prevent the bills being carried off or injured by rats or mice. In due time Mr. Knoblock was appointed guardian for Adamsky and demanded of *Burns* possession of the balance of the money. *Burns* denied having any more. Thereupon this action was commenced and prosecuted with the result before indicated.

For the plaintiff in error there was a brief by *Gittins & Burgess* and *Wallace Ingalls,* and a separate brief by *Wm. E. Lee,* and oral argument by *Mr. Ingalls* and *Mr. Lee.*

For the defendant in error there was a brief by the *Attorney General, A. C. Titus,* assistant attorney general, and *Fulton Thompson,* district attorney, and oral argument by *Mr. Titus* and *Mr. Thompson.*

The following opinion was filed December 6, 1910:

MARSHALL, J. Serious complaint is made because the trial court overruled a challenge for favor of one of the jurors, he having testified, upon the *voir dire,* of having formed an opinion on the merits of the case, about the time of the occurrence in question, from what he had heard, including some things said by the guardian of Adamsky; that it was a mere impression, one from which he would not say the accused was guilty, and which, though it remained in his mind, would not influence him in rendering a verdict on the evidence. The examination of the juror was quite searching and indicated that he was a business man of more than ordinary capability, without any personal acquaintance with the accused, or with the person whose money the latter was charged with having taken, without any interest in the result, more than that of citizens in general, and without any personal feeling for or against the accused.

The error assigned in respect to the foregoing is ruled in favor of the state by *Baker v. State,* 88 Wis. 140, 59 N. W.

570. It was there held, and is here affirmed, that a juror is not necessarily incompetent simply because of his having an impression or opinion respecting the merits of the case, formed from reading newspaper accounts and from other hearsay information; that in case of a challenge, as in this case, the issue presented is one of fact to be determined with reference to the evidence of the juror, his general characteristics as appears thereby, and impressions upon the court created by the opportunity for seeing him and witnessing and participating in his examination; that the other evidentiary matters referred to may so neutralize his mere statement of having formed an opinion or impression which will take some evidence to remove, that a finding that he satisfies the constitutional call for impartiality cannot be disturbed on appeal as manifestly against the clear preponderance of the evidence.

The doctrine of *Baker v. State, supra,* has support, and condemnation as well, in other jurisdictions. It is believed there is progressive legal thought in its favor. Some courts hold that if a juror has an impression or opinion as to the merits of a case which will take evidence to remove, he is legally incompetent to act; that however firmly and conscientiously he may believe he can act impartially in the matter, it does not cure the infirmity, for the court, in deference to the constitutional right to an impartial jury, will not permit a litigating party, without his consent, to take the chances of the juror being wrong, much less compel him to. But many other jurisdictions, in harmony with *Baker v. State,* hold that, notwithstanding the mental condition suggested,—in the absence of any evidence showing therewith, satisfactorily, the opinion or impression of the juror to be something more than such as is commonly created in the minds of intelligent people from reading and hearing the news from day to day, an opinion that amounts to real substantial prejudice,—incompetency does not exist, necessarily, as a matter of law, but depends upon the trial judge's determination of fact in

view of all the evidence and mental characteristics of the juror as disclosed by his presence in court and manner of testifying. The finding in that regard, in many jurisdictions, is classed the same as any other of fact by a trial court, as regards requirements to disturb it. This court and some others have gone somewhat further, as indicated in this language from *Reynolds v. U. S.* 98 U. S. 145, 156:

"No less stringent rules should be applied by the reviewing court in such a case than those which govern in the consideration of motions for new trial because the verdict is against the evidence. It must be made clearly to appear that upon the evidence the court ought to have found the juror had formed such an opinion that he could not in law be deemed impartial. The case must be one in which it is manifest the law left nothing to the 'conscience or discretion' of the court."

The quoted language was referred to with approval in the *Baker Case* and voices the rule in this state. In view of that we are unable to overrule the decision of the trial court though the decision below might well have been the other way.

Great care should be exercised in a criminal prosecution to preserve to the accused his constitutional right to an impartial jury and a fair trial. Ill-advised impatience with the failures to convict, and delays and expense in criminal prosecutions, should not be allowed to overturn or invade the fundamental safeguards of personal and property rights. Notwithstanding the decision in the instance before us, which we feel bound to make in harmony with the settled judicial policy of the state, we have no hesitancy in saying that, generally speaking, trial administration is to be commended rather than complained of, which excuses a juror upon his testifying, on the *voir dire,* that he has heard and read about the case and therefrom formed an opinion on the merits thereof, which persists with him and will persist till removed by evidence; notwithstanding he may testify that, in his opin-

ion, he can act impartially between the parties upon hearing the evidence. Doubtless circumstances may alter cases as they do in most situations.

Error is assigned because the court instructed the jury to the effect that, if the accused converted to his own use any of Adamsky's money, he did so as bailee. It is suggested that the court should have defined the term "bailee," as used in the statute, and left it to the jury to find the fact as to whether the circumstances satisfied such statute or not.

A court may properly instruct a jury in a criminal case, as well as any other, respecting any fact, or facts, established by the evidence beyond any room for reasonable controversy, and when such evidentiary facts exist establishing, beyond any room for reasonable controversy, an essential of any ultimate conclusion sought, it is not harmful error, if error at all, to treat such essential as having been proven, as the court here did in saying that the accused was a bailee of whatever of Adamsky's money came to his possession.

It seems to be thought that a bailment was not established by the evidence because some sort of contract *inter partes* was essential thereto. No particular ceremony or actual meeting of minds is necessary to the creation of a bailment. If one, without the trespass which characterizes ordinary larceny, comes into possession of any personalty of another and is in duty bound to exercise some degree of care to preserve and restore the thing to such other or to some person for that other, or otherwise account for the property as that of such other, according to circumstances,—he is a bailee. It is the element of lawful possession, however created, and duty to account for the thing as the property of another, that creates the bailment, regardless of whether such possession is based on contract in the ordinary sense or not.

It is said, generally, in the books, that a bailment is created by delivery of the personalty to one person by another to be dealt with *in specie* as the property of such other person

under a contract, express or implied, but the word "contract" is used in a broad sense. The mutuality essential to the contractual feature may be created by operation of law as well as by the acts of the parties with intention to contract.

So it makes no difference whether the thing be intrusted to a person by the owner, or another, or by some one for the owner or by the law to the same end. Taking possession without present intent to appropriate raises all the contractual elements essential to a bailment. So the person who *bona fide* recovers the property of another which has been lost, or irresponsibly cast away by an insane man, as in this case, is a bailee as much as if the same property were intrusted to such person by contract *inter partes*. In the latter case the contract creates the duty. In the former the law creates it. Such a situation is to be distinguished from that where one knowingly receives money paid him by mistake and fraudulently retains it. There the element of *bona fide* possession may be said not to exist and so the duty accompanied by such possession essential to a bailment not to have been created. *Fulcher v. State,* 32 Tex. Crim. 621, 25 S. W. 625. We refer to that case by way of illustration, not by way of approval. The logic of it may not be strictly correct.

The finder of property who voluntarily *bona fide* takes it into his possession, immediately, thereupon, has imposed upon him by law the duties of a depositary, the mildest type, as regards degree of duty, of bailee. Story, Bailments, §§ 86, 87; Edwards, Bailments (3d ed.) § 18; Paine, Bailments, § 24.

So the finder here of the cast-away money was clearly a bailee, and when his duties were voluntarily assumed by the accused he became such, and as there was no controversy in respect to such finding and assumption, the court's reference to the matter was proper.

The next suggestion in behalf of plaintiff in error is that, if the accused was guilty of any offense, it was that of having

broken the package and extracted therefrom part of the contents for the purpose of appropriating it to his own use, and executed such purpose, thus committing the offense of larceny, not of conversion by a bailee. It is a sufficient answer thereto that the purpose of the statute, sec. 4415, Stats. (1898), was to abolish the distinction between conversion by a bailee of an entire thing, as a quantity of property in a package of some kind, and the unlawful breaking of the package and conversion of part or all of the contents,—whether preceded by the element of breaking bulk with intent to permanently deprive the owner of the thing appropriated or not,—making the latter a statutory class of larcenies, differing only from ordinary larcenies, by absence in the former of the element of trespass in gaining original possession, which is essential to the latter. *Topolewski v. State,* 130 Wis. 244, 109 N. W. 1037. The meaning of the statute, as indicated, seems very plain:

"Whoever being a bailee of any chattel, money or valuable security shall fraudulently take or fraudulently convert the same to his own use or to the use of any person other than the owner thereof, although he shall not break bulk or otherwise determine the bailment, shall be guilty of larceny. . . ." Sec. 4415, Stats. (1898).

It follows that the acquittal of the accused of the offense of larceny is not inconsistent with his conviction of the statute offense of larceny as bailee.

Error is assigned because of the misconduct of a juror after the panel had retired to deliberate upon their verdict, and misconduct of the officer in charge of the jury. Such misconduct consisted in the former, while the latter were in his charge, and absent from their room at the supper hour, permitting a paper to be possessed by them by which they learned that the conditions of their deliberations were known to the public, and particularly the fact that one juror was persisting against the opinions of his fellows that the accused

was not guilty. Though the conduct of the officer and the jury as well, and the newspaper too, are reprehensible to a high degree, we are unable to reach a conclusion that, had the improper conduct not occurred, the result might, within reasonable probabilities, have been different. Therefore, under the uniform course of our administration and in harmony with the letter and spirit of sec. 2829 of the written law, the misconduct does not call for a reversal.

Notwithstanding the result as to the last assignment of error treated, we are constrained to severely condemn such conduct as the officer and jury were guilty of, and condemn the abuse of freedom of the press in publishing the secrets of the jury room while the case was there being considered. The press is accorded great freedom and constitutional protection, but it should not be forgotten that it is responsible morally and legally for abuse of that right. It is of great importance to the public welfare that such right should be kept inviolate, but of equal importance that its abuses should be prevented so far as practicable and otherwise punished both by legal remedies and by condemnation at the bar of public opinion.

Judicial proceedings, in a case which the law requires to be conducted in secret for the proper administration of justice, should never be, while the case is on trial, given publicity by the press. It is not infrequent that proceedings in courts of England in an important criminal case, are highly commended by the press of this country and comparison with procedure in the latter unjustly made unfavorable thereto, without appreciating that the very things which attract the favorable mention, are promoted by restrictions upon personal liberty which do not exist here at all, or are sparingly enforced. Such an occurrence during an important criminal trial after retirement of the jury to deliberate upon their verdict, as publication in a newspaper of the secrets of the jury room, would, in the mother country, be visited by prompt and severe punishment as contempt of court. That precedents of

like treatment of offenders may be found in the decisions of courts of this country, is well illustrated by *State v. Howell,* 80 Conn. 668, 69 Atl. 1057. Here the duty to abstain from such abuses is just as great as elsewhere. Here the sense of duty incident to good citizenship and public condemnation for such abuses ought to be sufficient to prevent such occurrences. Moreover, trial courts should be alive to the importance of protecting jurors from such interference during the course of a trial, particularly after their retirement to deliberate upon their verdict, in important criminal cases.

The best administration requires that all avenues of communication between the jury and others, except the officer in charge and the court in the presence of attorneys for the respective parties, should be closed as effectually as possible and all violations of duty in that respect by jurors and officers and others should be severely rebuked or punished according to circumstances. The inadvertence which permits jurors, after having retired for such deliberation, to leave the jury room under such circumstances as to get into communication with others and read the newspapers, should be carefully avoided. This is but reiterating what has heretofore been said by this court on several occasions. *Hempton v. State,* 111 Wis. 127, 86 N. W. 596; *Oborn v. State,* 143 Wis. 249, 126 N. W. 737.

We do not overlook the complaint that Adamsky was permitted to testify notwithstanding his impaired mental condition, particularly at the time of the occurrences in question. A person is not necessarily incompetent to testify because of such impairment. Whether he is so infirm by reason of insanity, or otherwise, as not to be entitled to testify at all, is generally in the field of competency. Therefore the decision of the trial court in favor of receiving the evidence for what it is worth, cannot be disturbed unless manifestly wrong. Ordinarily such infirmity goes to the weight of the witness's evidence, not to competency to testify, unless the impairment

is substantially total or such as to render the person wholly unconscious of the obligations of an oath. Best, Evidence (10th ed.) §§ 148, 150; *Cannady v. Lynch*, 27 Minn. 435, 8 N. W. 164.

The foregoing covers all the complaints on behalf of the accused which require special attention.

By the Court.—The judgment is affirmed.

A motion for a rehearing was denied March 14, 1911.

FIDELITY TRUST COMPANY, Administrator, Respondent, vs. WISCONSIN IRON & WIRE WORKS, Appellant.

December 7, 1910—March 14, 1911.

Master and servant: Warning of danger: Negligence: Contributory negligence: Special verdict: Omissions: Waiver: Presumptions.

1. Where in a factory a temporary and not very obvious change is made whereby a poisonous liquid flows from a hose in place of water, a reasonably explicit notice of the change should be given to employees who have been accustomed to drink the water from such hose.
2. The ordinary warning or instruction which it is the duty of a master to give to his employee concerning latent dangers in the work is not sufficient in such case.
3. In an action for death of an employee caused by drinking the poisonous liquid, where the negligence charged against the employer was failure to give notice of the change, the question whether the decedent was negligent in failing to investigate before drinking was sufficiently covered in the special verdict by a question relating to contributory negligence, and no separate question concerning assumption of risk was necessary.
4. Where there is a controversy as to whether or not the act or omission charged as negligence of the defendant did in fact occur, the jury should be required, if a special verdict is taken, to determine separately whether such act or omission occurred, and, if it did, whether it occurred in consequence of a lack of ordinary care on the part of defendant.

5. But defendant cannot, in such a case, complain that the only question submitted was whether in such act or omission he was guilty of a want of ordinary care, where he did not request the submission of any other or broader question covering the issue omitted, but in fact proposed a still narrower finding.

6. All controverted matters of fact not covered by the special verdict and not brought to the attention of the trial court by the party against whom the judgment goes, are presumed to have been determined by the court in conformity with the judgment.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *Aarons & Niven,* and oral argument by *C. L. Aarons.* They cited, among other authorities, *Bourda v. Jones,* 110 Wis. 52, 85 N. W. 671; *Burnham v. Norton,* 100 Wis. 8, 75 N. W. 304; *Klatt v. N. C. Foster L. Co.* 92 Wis. 622, 66 N. W. 791; *Yezick v. Chicago B. Co.* 138 Wis. 342, 120 N. W. 247; *Yunkes v. Racine-Sattley Co.* 135 Wis. 81, 115 N. W. 348; *Rysdorp v. George Pankratz L. Co.* 95 Wis. 622, 70 N. W. 677; *Groth v. Thomann,* 110 Wis. 488, 86 N. W. 178; *Maanum v. Madison,* 104 Wis. 272, 80 N. W. 591; *Goetsch v. International H. Co.* 138 Wis. 385, 120 N. W. 281; *Peake v. Superior,* 106 Wis. 403, 82 N. W. 306; *Johnson v. St. Paul & W. C. Co.* 126 Wis. 492, 105 N. W. 1048; *Campshure v. Standard Mfg. Co.* 137 Wis. 155, 118 N. W. 633; *Coman v. Wunderlich,* 122 Wis. 138, 99 N. W. 612; *Rahles v. J. Thompson & Sons Mfg. Co.* 137 Wis. 506, 118 N. W. 350, 119 N. W. 289; *Odegard v. North Wis. L. Co.* 130 Wis. 659, 110 N. W. 809; *Jirachek v. Milwaukee E. R. & L. Co.* 139 Wis. 505, 121 N. W. 326; *Buchman v. Jeffery,* 135 Wis. 448, 115 N. W. 372; *Ryan v. Oshkosh G. L. Co.* 138 Wis. 466, 120 N. W. 264.

James D. Shaw and *Oscar W. Kreutzer,* for the respondent, cited, besides other cases, *Rohloff v. Aid Asso.* 130 Wis. 61, 109 N. W. 989; *Steber v. C. & N. W. R. Co.* 139 Wis. 10, 120 N. W. 502; *Brunkow v. Waters,* 131 Wis. 31, 110 N. W.

82; *Horr v. C. W. Howard Co.* 126 Wis. 160, 105 N. W. 668; *Peck v. Baraboo,* 141 Wis. 48, 122 N. W. 740; *Boucher v. Wisconsin Central R. R. Co.* 141 Wis. 160, 123 N. W. 913.

The following opinion was filed January 10, 1911.

TIMLIN, J. In this case there was evidence tending to show that in one of the basement rooms of defendant's factory, called the plating room, there was near the north wall a tank containing a solution of cyanide of potassium. Immediately south of the center of this tank, pendant from this basement ceiling and extending down a little below the upper rim of the tank, there was an iron pipe connected with the city water supply, carrying a faucet on its lower end, to which was often or usually attached a length of rubber hose which extended southward through part of the room on the floor and had its other and open end raised up to and lying over the edge of and partly into a receptacle located near the center of the room called the scrubbing tank. On the south wall of this basement room was a hot-water tank and there were other tanks in the room. The city water flowed through this pipe into the hose and from the open end of the hose into the scrubbing tank. The employees of defendant, to the knowledge of defendant's superintendent, were accustomed to go into this plating room and drink from the flowing open end of this hose which rested upon said scrubbing tank. On October 21, 1907, shortly after 5 o'clock in the evening, the superintendent of defendant caused the north end of this hose to be detached from the water pipe mentioned and thrust into the solution of cyanide of potassium in the tank containing this liquid. The extension of the hose lay on the floor as usual, leaving the south open end thereof at the scrubbing tank as usual. He did this to syphon the contents of the tank containing the poisonous liquid into the scrubbing tank. The solution of cyanide of potassium thus syphoned over to

the scrubbing tank through the hose theretofore used for city water was not clearly distinguishable from the city water. It had some odor, modified or overcome by other chemical odors in the same room, and it had a slightly yellow tinge, but it was not readily distinguishable from the drinking water that formerly flowed through this hose. Looking from the scrubbing tank the hose extended along the floor northward in its usual direction, ascended near to and a few inches by the water pipe to which it was formerly attached, and then lay over the rim of and into the tank containing the poisonous liquid. The superintendent testifies that he went up to the polishing room where plaintiff's decedent was at work and (quoting from appellant's brief) said substantially as follows:

"Now, Julius, don't go down for wash water tonight, I am running the bronze solution over into the scrubbing tank and if you get some of that it will take the hide off of you."

The plaintiff's decedent slapped his hand on the shoulder of the superintendent and replied:

"Don't tell me about that stuff, Glenister, I have worked in a plating room. He also made the remark that he used to have his fingers all cracked open."

One Hoppe, a fellow workman, also testified substantially to the same effect. There were contradictions and improbabilities tending to show that this testimony might not have been true. But the case might also be disposed of on the hypothesis that this warning was given in the words above quoted. At 5:25 p. m. plaintiff's decedent and Hoppe quit their work for the day in the polishing room on the first floor, and went down the stairs and into the plating room in the basement to get hot water for washing themselves, as was their custom. They went first to the hot-water tank, filled their buckets with hot water, and decedent first went to the scrubbing tank apparently for the purpose of cooling this water

with the city water flowing from the open end of the hose. Acting under the impression that the drinking water was flowing as usual from this end of the hose, he drank of this poisonous liquid which caused his death.

The question arises whether under the circumstances ordinary care required the defendant, under whose authority this insidious and deadly change was made, to give a fairly specific warning to the men accustomed to drink from the open end of the hose. This is not the case of a master instructing his employees concerning the dangers attendant upon work to be done by the latter. What would be a sufficient warning in that case might not be a sufficient warning in a case like this. The warning alleged to have been given in the instant case might have been found to be misleading. It seemed to relate only to washing. Nothing would have been easier than to station a man at the place where the employees usually drank, or to indicate by placard or some similar means that the ordinary healthful beverage had been changed to poison, or to specifically inform the decedent as stated in the first question of the special verdict. There was a special verdict returned by the jury, the first question and answer of which were as follows:

"Was the defendant guilty of a want of ordinary care in failing to inform plaintiff's intestate that a poisonous solution was running through the hose in question? *A.* Yes."

This was followed by a finding of proximate cause, lack of contributory negligence, and damages, each favorable to the plaintiff. Extended discussion is indulged in relative to whether or not there was any evidence sufficient to negative the testimony of Glenister and Hoppe to the effect that they had warned deceased as quoted. But there was no evidence offered to show that any one on behalf of defendant expressly informed plaintiff's intestate "that a poisonous solution was running through the hose in question." This is the only finding relating to defendant's negligence, and if the judg-

ment cannot be supported on this finding and the inference to be drawn from the judgment a reversal is necessary.

The defendant failed to request the submission of any broader question. It merely requested that the court submit the following, even narrower than the question submitted in that it contained no finding of negligence: "Did the defendant fail to inform plaintiff's intestate that a poisonous solution would be run through the hose on October 21, 1907?" This seems to indicate that counsel on both sides recognized and led the court to believe that a specific warning to this effect was necessary, although there was no evidence that such specific warning was expressly given. The form of the question submitted is faulty and should not ordinarily be used, because in a case where it is contended on the part of the defendant that the act or omission relied on by the plaintiff to constitute negligence never in fact occurred, a question like this might be understood as assuming that the negligent act or omission occurred and that the jury was required to determine only whether or not the defendant was guilty of a want of ordinary care by reason of such act or omission, which the question might be taken to assume had been established. The question should be divided into two, one asking whether the act or omission occurred, and the other asking whether this occurred in consequence of lack of ordinary care on the part of the person accused of negligence. Or the question might be recast into one question in such form that the jury would be more clearly required to pass upon the fact whether or not the act or omission in question occurred, and also whether or not it occurred in consequence of lack of ordinary care. But we do not consider this error in the form of question sufficiently serious to call for reversal in the instant case. The mere fact that there was no evidence that such specific warning was given would not authorize the court to direct a verdict for the plaintiff, because the inference of lack of ordinary care to be drawn from the failure to give such specific

warning was still a question for the jury. The jury would have been authorized to find from the evidence relating to the warning alleged by defendant's witnesses to have been given (1) that the warning was not given at all; (2) that the warning alleged to have been given was so uncertain, vague, ambiguous, and misleading as not to be an adequate warning under the peculiar circumstances here in evidence; (3) that the warning alleged to have been given was given, and, notwithstanding its language, was sufficient to put the decedent upon inquiry and charge him with notice of the change made and the true situation existing in the plating room.

No such questions were requested by the defendant. The only question requested by defendant relating to negligence or lack of negligence on its part was that hereinbefore noticed. The defendant did request the submission of a question relating to the contributory negligence of the plaintiff's decedent; but the court properly covered the same issue by a question in the usual form.

With reference to defendant's negligence the court charged the jury:

"In determining whether or not the defendant exercised due care in respect to giving the deceased a warning, you may consider, if you find that the warning was given, the definiteness or lack of definiteness of such warning, its ambiguity, if any, or freedom from ambiguity, its remoteness or lack of remoteness in point of time from the time of probable contact with such danger, and all the other evidence, facts, and circumstances in the case. . . . The duty to instruct does not go so far as to require the master to acquaint the employee with every possible danger to which he may be subjected in the course of his employment. The master has the right to assume that the servant will see and appreciate those dangers which are open and obvious to a person of ordinary comprehension and will use the knowledge and experience he has gained in the course of his employment."

From all this it seems that the trial was conducted upon the theory that if the warning alleged to have been given, con-

sidering the knowledge of the situation and the experience possessed by decedent, amounted in substance and effect to a notice that the poisonous solution was running or would be run through the hose, the jury might answer the first question in the negative. If this is the meaning of the verdict it rests upon sufficient evidence. Whether this be the meaning of the verdict or not, the defendant failed to request the submission of any other or different question which would bring more clearly before the jury the inquiry whether the warning alleged to have been given was sufficient to charge the decedent with notice of the change made and the true situation existing in the plating room. As the case stands, we must decide that the failure to request such question left it to the court to decide, as the jury might have done, that the warning alleged by defendant's witnesses to have been given, if in fact given, was insufficient for the purpose above stated. Sec. 2858*m*, Stats. (Laws of 1907, ch. 346); *Smith v. Reed*, 141 Wis. 483, 124 N. W. 489. Hence the verdict of the jury, aided by the presumption created by statute, sufficiently covers all the facts upon which the liability of defendant is predicated. An insufficient warning is in legal effect equivalent to no warning. *McDougall v. Ashland S. F. Co.* 97 Wis. 382, 73 N. W. 327; *Fox v. Peninsular W. L. & C. Works*, 84 Mich. 676, 48 N. W. 203, 44 L. R. A. 81, and notes; *Wolski v. Knapp-Stout & Co. Co.* 90 Wis. 178, 63 N. W. 87. All assignments of error going to the insufficiency of the evidence must therefore be overruled. The appellant cannot successfully predicate error upon the form of the first question of the special verdict for the further reason that it proposed to the court a similar question and proposed no other or different form of question. It cannot now complain of the question submitted as lacking in scope, not having proposed, or at least suggested, a question covering the issues, if any, not covered by the verdict as returned. We perceive no error in submitting to the jury for its determination, under the

circumstances in this case, the question of the sufficiency of the warning alleged to have been given as the court did by its instructions. This was in the instant case a question resting upon complicated conditions and inferences of fact such as the previous knowledge of decedent, the practice in the plating room, and the former mode of conducting the operation of emptying the cyanide of potassium tank. There was no evidence of assumption of risk as contradistinguished from contributory negligence in this case. *Campshure v. Standard Mfg. Co.* 137 Wis. 155, 118 N. W. 633. On the subject of warning the case is not ruled by *Rahles v. J. Thompson & Sons Mfg. Co.* 137 Wis. 506, 118 N. W. 350, 119 N. W. 289. Here the warning to be of any value must have been sufficiently specific to apprise an ordinarily prudent person possessing the experience of decedent of the nature of the change made or the danger to be apprehended. Any other warning would have been quite an idle ceremony.

Many errors are assigned which we cannot undertake to notice separately in this opinion. They have been all examined. We find no prejudicial error in giving the instruction relative to the burden of proof on the question of negligence sandwiched in among the instructions relative to proximate cause. The form of the special verdict relative to proximate cause justified this. Some of the requested instructions are covered by the charge given; some call attention too partially to particular items or phases of the evidence; some are correct and might have been given, but there was no prejudicial error in the refusal.

The defendant had the right to present its evidence by deposition and no unfavorable inference should be made because it chose or was compelled to choose this lawful mode. But the comments of plaintiff's counsel in this respect were corrected by a ruling of the court and no prejudice resulted therefrom. We find no prejudicial error in the rulings on the admission of evidence.

On the whole we are convinced that the trial was as nearly correct in its conduct and result as the appellant can hope to obtain or has a legal right to insist upon in a case based upon facts like those here in evidence, and that there occurred no serious or prejudicial error calling for a reversal of the judgment of the court below.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied March 14, 1911.

KNUDSEN, Administratrix, Appellant, vs. LA CROSSE STONE COMPANY, Respondent.

February 1—March 14, 1911

Master and servant: Injury: Unsafe working place: Liability of master: Presumptions: Negligence of fellow-servant: Foreman.

1. The master should furnish his servants with a reasonably safe place to work; reasonably safe instrumentalities with which to do the work; and fellow-servants provided should be reasonably safe as such,—the standard of care as to each duty being such as is exercised by the great mass of mankind under the same or similar circumstances.
2. The presumption of fact is in favor of the master having performed the duties mentioned till overcome by evidence establishing the contrary to a reasonable certainty.
3. The safe-place rule having been satisfied at the start, and the conditions being such that thereafter the servants necessarily are expected to make their own working places, which must, necessarily, change from time to time and at short intervals as the work proceeds, dangers created are not attributable to the master.
4. In the circumstances last mentioned, negligence of one or more of several servants, not excepting the foreman of the crew, rendering the working place of some other servant, or servants, unsafe is negligence of a fellow-servant.

5. In operations where the servants necessarily make their own working place, the safe-place-to-work rule has little or no application.
6. The foreman of a crew erecting a water tank, or removing heavy machinery from a car to a factory, or moving a pile-driver, or in charge of a train crew, or the crew of a vessel, or a dock crew in regard to all the details of the general employment as regards the safe-place rule, is a fellow-servant of the men under him.
7. A blaster working with others under a foreman, all constituting a stone quarry crew, is a fellow-servant of such foreman in respect to duties of the latter as to guarding against the working place of those under him being made unsafe by the rolling down from one level to another of earth or rock in the course of quarry work.

[Syllabus by MARSHALL, J.]

TIMLIN, SIEBECKER, and KERWIN, JJ., dissent.

APPEAL from a judgment of the circuit court for La Crosse county: E. C. HIGBEE, Circuit Judge. *Affirmed.*

Action to recover damages for the death of plaintiff's intestate. The deceased while employed by defendant as a blaster was killed, and, as alleged, under the following circumstances:

The intestate and others under a foreman were put to work for defendant in its stone quarry. There was a shelf of rock some ten feet wide, fifty to seventy feet long, and about fifty feet above the surface below, composed of rock. From the back side of the shelf a bank of rock and earth rose upwards, at a sharp angle backward, fifteen to twenty feet to the top of a hill or bluff. Plaintiff on the day in question, by direction of the foreman, was at work on the shelf drilling blast holes. Other employees had partially loosened portions of rock and earth from the edge of the bank above. A large mass at the edge had been loosened so as only to be retained from rolling down by the frozen condition and roots. While the situation was such that the partly loosened mass was liable to fall at any time, that was not apparent to a person on the shelf below. The rule of the quarry was that the fore-

man should, personally, see that no chunks of earth or rock were allowed to be so circumstanced as to be liable to unexpectedly roll down and injure employees, and to see that no such dangers existed before putting employees at work, as in the case in question, and, further, to have due warning given to employees within the zone of danger before allowing chunks of earth and rock to be loosened and rolled down the side of the bluff. The situation in the particular case should have been known to the foreman before sending deceased to work on the shelf. The latter was entirely ignorant of such situation and was not guilty of any want of ordinary care in respect thereto. As directed he commenced operations on the shelf in the forenoon of December 31, 1909. He was not warned of the danger as before indicated. He was assured that the place was safe and relied thereon. While engaged in his work a large chunk of earth and rock suddenly became detached from the side of the bluff above and rolled down upon and killed him.

There were other allegations requisite to make out a cause of action if defendant was actionably negligent in respect to the cause of the death aforesaid.

Defendant answered putting in issue all allegations making out a breach of duty on its part and pleaded contributory negligence.

The evidence showed, or tended to show, this: The physical conditions were as alleged in the complaint. In the progress of the work, from time to time, it was necessary to uncover rock further back on the bluff than the shelf where deceased was directed to work and above that point. The work of uncovering at the particular time of year, because of the earth being frozen, required employees to go to the proper place at the crest of the bluff above the shelf, and by the use of wedges, crack off the frozen earth by strips and allow the same to roll down. In the forenoon of the day in question the foreman directed one of the crew to do work of that sort and

marked off the particular strip of earth to be thrown down. By noon such strip had been sufficiently loosened to open up a seam back of it about six inches wide on the surface, and about ten feet long. The employee was then directed to help deceased on the shelf which was in the pathway of the partly loosened strip. The two commenced work on the shelf about 2 o'clock in the afternoon. They worked together a short time before noon. The foreman did not make any effort to discover the condition of things above the shelf. It was not observable to one circumstanced as the deceased was on the shelf and he did not know of it. While he was busily engaged and the foreman and one or two others were near by the strip of frozen earth came wholly loose, rolled down, and swept him from the shelf, causing him to fall on the rocks below with fatal effect. The foreman was under instructions to guard employees against such dangers. It was the custom for the foreman of a quarry to see that overhanging earth or rock was not left so as to be liable to roll down where employees were required to work and endanger their personal safety. The foreman in this case could have seen by casual observation before he sent the men to work in the afternoon that the strip of earth he had directed to be loosened had not been thrown down. Defendant relied upon such dangers as the one in question being prevented by the foresight of its foreman. He had full charge of the workmen and working conditions in the quarry. He directed operations as was necessary and himself took a hand in doing the work, sometimes at one place and sometimes at another.

The jury found thus: The working place where deceased was stationed was not reasonably safe. The frozen strip of earth was loosened by directions of the foreman. He directed deceased to work where he was located when swept from the cliff. The foreman did not know of the conditions respecting the strip of earth which had been partly loosened prior to the accident. In the exercise of ordinary care he

ought to have known thereof. He did not warn deceased of the danger. The latter did not know of the strip of earth having been loosened. He was not guilty of any want of ordinary care in that regard. He did not have facilities equal to the foreman for knowing of the danger. Such danger was the proximate cause of the disaster complained of. The direction given to the deceased to work where he did, under the circumstances, was a proximate cause of his death. The failure of the foreman to warn deceased of the danger was a proximate cause of his death. The deceased was not guilty of contributory negligence. If on the facts plaintiff is entitled to recover the measure thereof should be $7,900.

Judgment was rendered notwithstanding the verdict in favor of the defendant.

For the appellant there were briefs by *Jesse E. Higbee* and *Frank Winter,* and oral argument by *Mr. Higbee.*

For the respondent there was a brief by *McConnell & Schweizer,* attorneys, and *Quarles, Spence & Quarles,* of counsel, and a separate brief by *Bunge & Bosshard,* attorneys; and the cause was argued orally by *A. C. Fish* and *C. H. Schweizer.*

MARSHALL, J. So it will be seen the defendant, in the legitimate pursuit of an important industry, a vocation which it was as important to the public and defendant's employees should be carried on as to the defendant itself, sent a crew to its stone quarry property for the purpose of operating the same. The working place was safe as the crew took possession thereof. Thereafter they necessarily made, in great part, their own respective working places. The safety of one was greatly dependable upon the conduct of his fellows. All were employed in the common employment. From day to day the work went on. Proper regulations, so far as any were required, were made. The working place was in proper condition in the morning in question. So far as ap-

peared to respondent up to the instant of the accident, the foreman and all associated with the blaster, Mr. Knudsen, were reasonably careful men and competent, in every way for performance of the duties assigned to them. The instrumentalities furnished for the work were all right. It was left to the crew so organized and equipped to do the work, the foreman being specially charged to look after the safety of the men and, particularly, as regards dangers from being in the pathway of earth and rock that might roll down the bluff.

The operation which resulted in creating the danger was conducted for considerable length of time and not more than about twenty-five feet from Knudsen's working place. While he may have been so circumstanced that he could not see the person at work while creating the danger, the manner and kind of work was such that he must have known what was going on and known when, later in the day the workman left the point above on the crest of the cliff and joined him, that the strip of earth and rock the former had been endeavoring to disengage had not been thrown down, though it must be there was no appearance of danger of its falling which he observed or could well have observed.

As Knudsen was working in supposed security, the very person aiding him who had been the immediate instrumentality in making the working place unsafe, and the foreman who had charge of the whole work and aided manually from time to time, near by, no one apparently appreciating the danger, the chunk of frozen earth came loose, rolled down the cliff, and in an instant, as it were, Knudsen was swept over the cliff and his life terminated with the necessary distressing consequences to those dependent upon him.

Thus passes before us another of those tragedies which are constantly recurring in the drama, so to speak, of our official life. Is there a remedy for the damage caused by the inadvertent taking of Knudsen's life? The question is not whether there ought to be a remedy from the viewpoint of

moral standards. It matters not how much we may think such sacrifices should be compensated in some way and that the loss must inevitably be paid for in the end by the mass of mankind, if not in a way to reimburse appreciably those upon whom the loss first falls. Courts cannot shape their decrees to meet their personal ideas or merely satisfy human sensibilities to human sorrow and suffering; moreover, at the expense of those neither guilty of a legal or moral wrong.

The world does not appreciate the high order of courage and firmness required to deal with these painful tragedies and at all times be reasonably sure of judgment reigning supreme instead of being swayed by sympathy which we may venture to say is no more keenly felt than by the judges of our courts. However, to execute their functions they must, the best they can, come up to the high ideal of this picture so truly and so beautifully painted by Chief Justice RYAN and which is to go down the ages inscribed upon the shaft erected in his honor:

"In other places in life, the light of intelligence, purity of truth, love of right, firmness of integrity, singleness of purpose, candor of judgment are relatively essential to high beauty of character. On the bench they are the absolute condition of duty. The judge who palters with justice, who is swayed by fear, favor, affection or hope of reward, by personal influence or public opinion, prostitutes the attribute of God and sells the favor of his Maker. But the light of God's eternal truth and justice shines on the head of the just judge and makes it visibly glorious."

So the only question before us for decision is this: On the undisputed facts disclosed by the evidence, has appellant a legal remedy against respondent? It cannot be decided by any system of arbitration. It cannot be decided by bending established principles out of their legitimate sphere or developing new ones to meet the dire necessities of the particular case. That the time is at hand when a just way will be found for transferring the loss inflicted by such sacrifices to

so broad a field that all will be compensated and the participating compensators carry the load and think the burden light if they appreciate it at all,—the writer has faith.

As we view the case it is governed by a few legal principles. We will endeavor to state them briefly, concisely, and with but little discussion. Their application to the facts will be seen easily from their logical arrangement.

A master owes the duty to his servants of furnishing them a reasonably safe place in which to do their work, of using ordinary care to keep such place reasonably safe, of furnishing them reasonably safe instrumentalities with which to perform their work, and of exercising ordinary care in the selection of servants whose work would otherwise imperil the personal safety of their fellows.

The presumption of fact, at the start, as to any given situation where liability of the master to the servant or through him is in controversy, is that the duties of the former, indicated, have been performed, and such presumption should prevail wherever the fact is called in question till overcome by evidence establishing the contrary to a reasonable certainty.

The master having furnished his servant a safe working place and satisfied the other conditions, or put such servants to work under such conditions that they must necessarily or reasonably make their own working place, or the place originally furnished is changeable naturally by the members of the crew as the work progresses, dangers thus created are not attributable to the master. *Peschel v. C., M. & St. P. R. Co.* 62 Wis. 338, 21 N. W. 269; *Walaszewski v. Schoknecht,* 127 Wis. 376, 106 N. W. 1070; *Miller v. Centralia P. & W. P. Co.* 134 Wis. 316, 113 N. W. 954.

The master having complied at the start with the conditions mentioned, negligent conduct of one or more of a working crew proximately causing injury or death of an associate, is negligence of a fellow-servant and not breach of duty of

the master. Who is and who is not a fellow-servant depends upon the nature of the service. So the foreman of a crew in exercising his functions as such in the common employment to accomplish a common purpose under one general management, some working at one detail, and some at another, is a fellow-servant, and the negligence of one is not attributable to the master except where aside from his fellow-servant duty that one performs by direction, express or implied, the work of the master as regards safe instrumentalities and safe fellow-servants or a safe place to work.

To illustrate the rule that where a working crew necessarily makes the working place, or places, for the members thereof or in due course constantly or at brief intervals change the same, we have this:

A crew under a foreman was employed to erect a water tank. The working place in general and particular was under the control of the foreman and as to one member of the crew upon a particular occasion was dangerous causing an injury to him. The negligence was held to be that of a fellow-servant. *Peschel v. C., M. & St. P. R. Co.* 62 Wis. 338, 21 N. W. 269.

In situations, in general, where the dangers of a working place are created by the servants themselves including the foreman and changed from time to time in the due course of operations the safe-place rule does not apply. *Strehlau v. John Schroeder L. Co.* 142 Wis. 215, 125 N. W. 429. That was applied to a quarry crew in *Mielke v. C. & N. W. R. Co.* 103 Wis. 1, 79 N. W. 22, where a piece of rock rolled down on to a workman very much as in this case, and again so applied in *Pern v. Wussow,* 144 Wis. 489, 129 N. W. 622, where the fact was that a chunk of frozen dirt was cracked off by a workman, as was the case here, and it rolled down and injured a fellow workman.

The following are illustrations of the rule that the fore-

man of a working crew carrying out the details of an enterprise is a fellow-servant of the men under him: A gang in the erection of a water tank. *Peschel v. C., M. & St. P. R. Co., supra.* That case applies to the safe-place rule and this feature of the law as well. A gang engaged removing a heavy machine out of a car and into a factory. *Hamann v. Milwaukee B. Co.* 127 Wis. 550, 106 N. W. 1081. A crew laying gas mains. *Gereg v. Milwaukee G. L. Co.* 128 Wis. 35, 107 N. W. 289. The men engaged in removing a pile-driver. *McKillop v. Superior S. Co.* 143 Wis. 454, 127 N. W. 1053. A conductor is the fellow-servant of a train crew under him. *Pease v. C. & N. W. R. Co.* 61 Wis. 163, 20 N. W. 908. The master of a vessel of his mate and other members of the crew. *Mathews v. Case,* 61 Wis. 491, 21 N. W. 513. The dock foreman and his crew as to all details of their general employment. *Okonski v. Pennsylvania & O. F. Co.* 114 Wis. 448, 90 N. W. 429. The foreman of a blasting crew and the men under him. *Wiskie v. Montello G. Co.* 111 Wis. 443, 87 N. W. 461.

Now look upon these familiar and thus plainly illustrated principles and then on the picture of this case. Does not the one fit the other perfectly? No complaint about the working place except as to the change created by Mr. Knudsen's associates after the crew went to work in the morning. No complaint about suitable tools or fellow associates up to the time of the accident. The foreman was very close to the members of the crew, going now here and now there, directing operations; taking part from time to time in the physical labor, helping this one and then that one as occasion required or opportunity afforded. But a few hours before the accident he, with Knudsen and another, or others, worked clearing off loose dirt a short distance from where the fatal occurrence took place. The breaking down of earth and removing it from over the rock to be quarried was one of the ordinary and

frequent operations in the quarry, particularly in the vicinity of where Knudsen was required to work and preparatory to such work. It was from every viewpoint one of the plainest of details in producing the general result to be accomplished. If due care on the part of the master required promulgation of rules in respect to preventing such dangers as that in question it seems that was done and the difficulty was respecting proper observation thereof.

Would it not be a plain violation of the stated principles to hold that it was the duty of the master to be present in person or by proxy with reference to such details as those mentioned? Such a rule would be utterly impracticable of observation. Here the master took the precaution to admonish the foreman to be alert in preventing just such dangers as the one which proved fatal to Knudsen; but that was plainly one of his ordinary duties as foreman, the proper performance of which Knudsen and all members of the crew took the chances of as ordinary risks of their employment. Such admonishment instead of being regarded as a transference of the master's duty to the foreman and so fix the negligence of the latter upon the former should be viewed as an extra and creditable precaution exercised to the end that the foreman as one of the crew should see that the particular detail was properly attended to.

So we cannot see any escape from the conclusion that the negligence which terminated the life of Knudsen is that of the man who loosened the bank of earth leaving it in a dangerous condition and then went to work with him in the line of danger from it, without informing him thereof, or the negligence of the foreman, or both, in any event, within the fellow-servant rule. Principles of law which are as binding on this court as written law, command it, furnishing one more in number of illustrations of the necessity for some practicable way of dealing with industrial accidents, mini-

mizing the misfortune thereof in line with the enlightened spirit of the age which has been responded to in most every civilized country but our own, and which only the lawmaking power can furnish.

By the Court.—The judgment is affirmed.

TIMLIN, J. (*dissenting*). I make no claim to possess that degree of tenderness and sympathy for the laborer expressed in the foregoing opinion and in *Houg v. Girard L. Co.* 144 Wis. 337, 352, 129 N. W. 633, 639, and in *Driscoll v. Allis-Chalmers Co.* 144 Wis. 451, 468, 469, 129 N. W. 401, 408. I proceed solely upon my understanding of the law and justice.

The decedent while engaged in drilling in a quarry with a rock drill was killed by a piece of frozen earth falling on him from a clay ledge above. This frozen chunk had been loosened by some other workman some hours before and left hanging in a dangerous position. After verdict in plaintiff's favor judgment was rendered against her on the sole ground that the deceased was a co-employee with McBride, the foreman in charge. This is the only question in the case.

The defendant was a corporation and one of its officers testified:

"We had delegated to McBride the full charge and supervision of the work in the quarry. He had authority to hire and discharge men and the direction of the men in the quarry. There was no one above him in the control of the work there. . . . At the time of this accident we had a rule in force for the operation of our quarry which dealt with the matter of hanging rocks and partially loosened rocks or earth. The rule was to have everything as safe as possible. *Q.* What was the rule in regard to dealing with overhanging rocks or loosened or partially loosened rocks or earth in your quarry? *A.* Why, the foreman who had charge of the quarry understands what was necessary to make it as safe as possible. He understood this by his own knowledge of every-

thing about a quarry. *Q.* Did Mr. McBride understand this? *A.* Certainly. *Q.* And you had instructed him to keep the quarry as safe as possible? *A.* Yes, sir, as safe as possible. *Q.* He was the sole person in charge of that duty? *A.* Yes, sir. *Q.* You had at that time a rule in your quarry that overhanging rocks, loosened or partially loosened, or masses of earth were to be wholly detached, thrown down, or blasted off? *A.* Not any particular rule. *Q.* Isn't that a common, customary rule in force in quarries at all times? *A.* That is customary for the foreman to do that. If he didn't do it he would not be a competent foreman. *Q.* And you expected Mr. McBride to do so? *A.* Yes, sir. *Q.* And that was his duty? *A.* Yes, sir. Where there was an overhanging rock or dirt cliff near the face of the rock or above a man's head or some loose rock or dirt partially loosened, it was the duty of the foreman to get this down before the men worked around it. *Q.* You required your foreman to do that? *A.* Yes, he was to do that. *Q.* That is the sole purpose of having a foreman there? That is why you have a foreman, to see if the quarry is safe before the men have to work around it? *A.* The foreman has charge of all the work in the quarry. Everything that is done in a quarry is important work. The action of the foreman in taking down loose rock is not the only protection which the men have. If there is any overhanging rock or cliff forms when the men are working, they are expected to take it down."

The foreman, McBride, testified:

"I told Knudsen [decedent] to go to the ledge and drill. I didn't make any effort to find out anything about the top of the bluff before I told him to go in there. I know that men had been working up there during the day, but I didn't go up to ascertain whether there was any loose or partially loosened earth up there. There was a path leading up there. It was about ten or fifteen feet above Knudsen's head."

There is a statement that all were expected to take down loose rock, but on the evidence above quoted there arises a fair question for the jury whether the corporation master did not assume to take charge of the safety of the place and attempt to exercise this duty through McBride. To my mind

the foregoing evidence is sufficient to support a verdict that the proprietor of the quarry charged McBride, the foreman, with the duty of making and keeping a safe place. On sufficient evidence the jury found McBride negligent. This was a duty of the master which he might intrust to the foreman in charge. But in the exercise of that duty the foreman was a vice-principal, and not a fellow-servant with Knudsen. I think this principle runs through all the cases. It is cited in *Baumann v. C. Reiss C. Co.* 118 Wis. 330, 335, 95 N. W. 139, as follows:

"The evidence is all one way that Roth had full charge of the work upon the dock, that defendant left to him the duty of providing a safe working place for the men, and that he was not personally engaged with them in removing the coal. That made him in every sense a vice-principal in respect to the safety of the trestle, and all other matters affecting the character of the working place in which he placed respondent and his associates."

If he was the foreman in charge and had this duty put upon him by the proprietor or master in addition to the duty of directing the work and sole control of the operation, it would make no difference that he occasionally or intermittently helped in some other part of the work. *McMahon v. Ida M. Co.* 95 Wis. 308, 70 N. W. 478. At a time when it was the settled law of this state that the brakeman and sectionmen on a railroad were fellow-servants it was nevertheless held that where the section foreman had imposed on him the duty to keep the track clear of obstructions at a point where the brakeman was obliged to run along the track in the discharge of his duty, the section foreman was not a fellow-servant with the brakeman so far as regards the duty of making or keeping the place safe. *Hulehan v. G. B., W. & St. P. R. Co.* 68 Wis. 520, 32 N. W. 529. To the same effect are *Schultz v. C., M. & St. P. R. Co.* 48 Wis. 375, 4 N. W. 399; *Hill v. Winston,* 73 Minn. 80, 75 N. W. 1030; *Streicher v. Davenport B. & T. Co.* (Iowa) 124 N. W. 327; *Kaukola*

v. Oliver I. M. Co. 159 Mich. 689, 124 N. W. 591; *Horn v. La Crosse Box Co.* 123 Wis. 399, 101 N. W. 935.

To recapitulate: The evidence hereinbefore quoted was sufficient, in my opinion, to warrant the jury in finding that the corporation defendant had through its officers assumed the duty and charged its foreman, McBride, with the duty of making and keeping the place safe. There is no law that I know of against its assuming this duty whether the place of operations be a quarry or a railway. Having, as the evidence shows, assumed and undertaken to discharge that duty through the foreman, it should be liable for its negligent failure to carry out the duty. The decedent with knowledge of such practice might lawfully rely upon the foreman to discharge that duty and thus be misled and lulled into false security. He was negligently killed without fault on his part, as established by the verdict. The plaintiff was therefore entitled to a judgment on the verdict.

I am authorized to say that Mr. Justice SIEBECKER and Mr. Justice KERWIN concur in this dissent.

CITY OF LA CROSSE, Appellant, vs. LA CROSSE GAS & ELECTRIC COMPANY, Respondent.

February 1—March 14, 1911.

Public utilities: Municipal corporations: Granting franchises: Terms and conditions: Excise tax: Public utility law: Surrender of old franchises: Indeterminate permits: Uniformity: What contracts and conditions abrogated.

1. A public franchise, burdened with a public revenue feature, is not grantable by a state agency in the absence of express or unmistakable legislative authority to impose such a burden.
2. Mere authority to a municipality, as in sec. 1780*b*, Stats. (1898), for the holder of a state franchise to exercise it within the cor-

porate limits of a city by consent of and in the manner agreed upon therewith, does not include power to such city to exact, as a condition of such exercise, payment of an excise tax in addition to all other taxes.

3. Sec. 1780*b* expresses no more than that the municipality may impose reasonable burdens.

4. Municipalities do not possess power to license occupations and exact compensation for the purpose of obtaining public revenue, in the absence of unmistakable granted authority to that effect.

5. The mere power to exclude a corporation from exercising a franchise in a municipality, does not include power to allow such exercise on condition of submitting to a special taxation burden.

6. Laws should be strictly construed to avoid reading therefrom a special tax burden feature.

7. A law authorizing a municipality to grant to a corporation the privilege to exercise its public utility franchise therein "upon such terms and subject to such rules and regulations and the payment of such license fees as the common council may prescribe" authorizes such use to be conditioned upon prescribed rates for service.

8. Such feature as that mentioned engrafted upon a corporate railway franchise by the state, or an authorized state agency, inheres therein and is subject to the reserved power to alter or amend.

9. Power to a municipal or *quasi*-public corporation to make contracts affecting public interests, acting in the mere business capacity to deal with proprietary matters, is not to be inferred by doubtful construction.

10. The condition of a corporate public utility franchise which inheres in the privilege as distinguished from mere contracts which the corporation may make, is subject to the provisions of the public utility law that all charges shall be just and reasonable.

11. A corporate franchise is one thing, a mere privilege not corporate, which may be granted without condition and become mere property—be sold and pass from one to another as other property may—is a far different thing.

12. The purpose of the public utility law of 1907 (Laws of 1907, ch. 499), was to ultimately secure uniformity in public utility franchises,—past as well as future grants,—to the end that patrons might obtain service on a plane of equality and at the lowest price practicable—producers and consumers being com-

pelled to deal justly with each other and both deal justly with the public as a whole.

13. The indeterminate permit of the public utility law, is a public privilege emanating direct from the state to own, operate, manage, or control any plant or equipment, or any part of a plant or equipment within the state for the production, transmission, delivery, or furnishing of heat, light, water, power, either directly or indirectly to or for the public, and is perpetual and exclusive, subject to the conditions of the public utility law. *State ex rel. Kenosha G. & E. Co. v. Kenosha E. R. Co., ante,* p. 337.

14. The scope of the privilege which springs into existence by operation of law by surrender of a franchise under the act of 1907 is the same as that of the one surrendered, divorced, however, from all the old conditions, and conditioned, only, upon the provisions of such act.

15. The idea of the act of 1907 was that old franchises, with their peculiar burdens, should be treated as entireties, and that the surrender, in form, of the principal thing should operate as an extinguishment of all incidents inhering therein, and that the thing taken back should be an exact equivalent as to the privilege feature but as to incidents and duration should be referable to the public utility law.

16. The surrender of a public utility franchise operates as a waiver by the corporation of all executory features of existing contracts regarding service charges regulated by the public utility law.

17. The feature of the public utility law rendering nonenforceable existing contracts relating to any charge or service regulated thereby, in case of conversion of an old into a new franchise by a surrender of the former, by necessary implication, renders nonenforceable obligations of the corporation incurred as a condition of the old franchise and substitutes therefor the obligations and conditions of such law.

18. The foregoing covers such special conditions of an old franchise as that of payment to the municipality of compensation as a consideration for the privilege, but not mere business contracts between the corporation and individuals as in case of *Superior v. Douglas Co. Tel. Co.* 141 Wis. 363.

19. To carry out the legislative idea of our system securing justice between municipalities, public utility corporations, and their patrons, future original franchises were treated in one group, franchises given for old grants in another,—the new creations

in either case to be indeterminate permits with uniform characteristics,—with municipal power to deal with the owner in any case or with the owner of an old franchise, referable solely to the public utility law.

[Syllabus by MARSHALL, J.]

BARNES, J., dissents.

APPEAL from an order of the circuit court for La Crosse county: E. C. HIGBEE, Circuit Judge. *Affirmed.*

Action for an accounting and to recover a debt claimed to be due under defendant's electric light franchise.

These are the facts stated in the complaint material for consideration:

Defendant is and was during all the times which concern this case, a public utility corporation in the city of *La Crosse,* Wisconsin, engaged in the generation, distribution, and sale of electric current therein for public and private purposes, using the streets and public places to that end. The terms of the franchise under which defendant used such streets and public places required it to pay into the treasury of the city two per cent. of its gross earnings in addition to such other taxes as are provided by law. November 8, 1909, the franchise required defendant to give plaintiff a statement showing the amount of its gross earnings for the previous year. It neglected and refused to do so or to afford plaintiff opportunity, by examination of its books, to determine such amount. Wherefore plaintiff is unable to state the sum or arrive thereat without an accounting.

There was an appropriate prayer.

Defendant answered, among other things, that pursuant to ch. 499, Laws of 1907 (sec. 1797*m*—77, Stats.), it duly surrendered the franchise referred to in the complaint and received in lieu thereof an indeterminate permit as provided in said section, and that, since July 22, 1908, it has conducted its business thereunder instead of the old franchise, which period includes the time covered by plaintiff's demand.

In addition to the foregoing defendant counterclaimed that November 8, 1908, it gave plaintiff a statement of its gross earnings for the previous year, but protested against being charged two per cent. thereof, except to the aforesaid date of surrender, but plaintiff refused to accept less than the full year's tax, wherefore defendant, December 23, 1908, paid the same, protesting, however, that it included an overpayment to the extent of $731.91.

Plaintiff demurred to the defense for insufficiency and likewise to the counterclaim. Both demurrers were overruled. Plaintiff appealed.

John F. Doherty, for the appellant.

For the respondent there was a brief by *Woodward & Lees,* and oral argument by *G. M. Woodward.*

MARSHALL, J. Secs. 940*b* to 940*j*, Stats. (1898), relating to the sale of franchises by cities and villages has no bearing here other than, perhaps, as indicating legislative conception of the clearness required in conferring power on a municipality to regulate occupations for the purpose of public revenue. In that respect the difference between such sections and the one important to this case is quite striking as we shall see. While that circumstance may have been given rather too great significance in deciding the case below, as counsel for appellant suggests, the reasoning of the circuit judge by no means is illogical. The learned judge did not refer to such sections as indicating that the appellant did not possess competency to condition exercise of respondent's franchise upon its paying a license tax in any other sense than that no such power was inferable from the mere existence of the municipal corporation with ordinary powers, and that no such authority was within the letter of the legislative language upon which appellant relied for its competency to act as a legislative agency. The suggestion of counsel that such sections rather tend to show the contrary of the circuit

judge's conclusion, overlooks the fact that the question is not whether a municipality might have the competency claimed, but whether appellant was afforded such competency by the written law depended on.

Unlike grants made under sec. 940*b* and its associate sections, where they are made wholly by the state agency method and with the plainest of authority as to dealing with the matter on a public revenue basis, the franchise in this case came directly from the state under sec. 1780*b* of the statutes. There was no municipal interference in the matter permissible, except such as was authorized by the words, "Any corporation . . . may, with the consent of and in the manner agreed upon with the authorities of any city or village, use any street," etc. It is not perceived how power to attach to a state franchise a public revenue condition can be gathered from the quoted language under the rules governing the subject. Under such rules and the precedents, such language contemplates mere police regulations. They do not extend to licenses with revenue incidents in the nature of excise taxes, or otherwise. *Wis. Tel. Co. v. Oshkosh,* 62 Wis. 32, 21 N. W. 828; *Marshfield v. Wis. Tel. Co.* 102 Wis. 604, 78 N. W. 735; *State ex rel. Wis. Tel. Co. v. Sheboygan,* 111 Wis. 23, 86 N. W. 657; *State ex rel. Wis. Tel. Co. v. Sheboygan,* 114 Wis. 505, 90 N. W. 441; *Wis. Tel. Co. v. Milwaukee,* 126 Wis. 1, 104 N. W. 1009; *State ex rel. Smythe v. Milwaukee Ind. Tel. Co.* 133 Wis. 588, 114 N. W. 108, 315.

It is said such authorities do not apply since they deal only with sec. 1778, giving, as construed, telephone companies absolute right to use streets under police regulations, while sec. 1780*b* gives such right conditioned upon consent of the municipality being given and an agreement being made as to the manner of the use, the one conferring power of exclusion and the other not. True, but the fact remains, as we construe sec. 1780*b* that the consent and agreement mentioned appertain merely to police regulations.

The power to license and exact fees, especially in the nature of a tax or compensation for use of a governmental privilege, cannot be exercised by a municipality unless expressly or at least, very plainly conferred. So the principles of the cases referred to apply, since, at the best for appellant, nothing other than mere police regulations are within the meaning of the language in question unless extended to the point of very doubtful construction under the circumstances.

In the first case cited it was held that express power to exclude does not give power to license and exact payments for revenue purposes. Here there was power to exclude or not at pleasure and to agree as to the manner of enjoying the consent in case of its being given. That came far short of conferring power to exact, as a condition of consent, payment of a license fee or tax of a contractual nature. Such a charge does not fall under the power, even to license, strictly so called, but rather the broader power to tax. *State ex rel. Att'y Gen. v. Winnebago Lake & F. R. P. R. Co.* 11 Wis. 35; *State v. C. & N. W. R. Co.* 132 Wis. 345, 112 N. W. 515; 2 Smith, Mun. Corp. § 1455.

Taxing laws are to be strictly construed, and that is peculiarly so as to such laws as the one under consideration. Probably such rule should be applied quite to the point of requiring words of unmistakable meaning to be used in conferring the power; words expressing the intention without going beyond the letter or necessary inference, where the effect would otherwise be not only to impose a tax of an excise character but impose it in addition to all other taxes of an ordinary character, as in this case. 2 Smith, Mun. Corp. § 1456 and cases cited.

Neither in the foregoing nor in anything which may hereafter be said in this opinion, do we overlook what was held in *Manitowoc v. Manitowoc & N. T. Co., ante,* p. 13, 129 N. W. 925. The questions there determined are:

(a) Sec. 1863, Stats. (1898), as amended by ch. 425,

Laws of 1901, authorizing use of the streets of any city for passage of interurban railway cars "with the consent of the common council" thereof "upon such terms and subject to such rules and regulations and the payment of such license fees as the common council may prescribe,"—empowers the municipality, as a state agency, to engraft upon the interurban railway franchise a feature limiting the rate of fare between the city and a point without reached by the railway service, to be submitted to as a condition of using the city streets for interurban railway purposes;

(b) A feature so engrafted upon a corporate railway franchise and accepted as part of the grant, inheres therein and is subject to the reserved power of the state under the constitution to alter or amend;

(c) Power to a municipal or *quasi*-public corporation to make contracts affecting public interests, acting in its business capacity merely and dealing with proprietary rights, is not to be inferred from the written law by doubtful construction;

(d) The power conferred upon cities respecting interurban railways under ch. 425, Laws of 1901, is that of acting as a state agency in moulding the character of corporate franchises of a particular kind and so subject to the reserved power to alter or amend;

(e) A franchise of the foregoing character, so far as it relates to the subject covered by ch. 362, Laws of 1905, while not superseded thereby is controlled by the language thereof requiring all charges for service dealt with by the act "to be reasonable and just" and prohibiting "every unjust and unreasonable charge for such service" and declaring every such charge "unlawful,"—to the extent that a condition of such a franchise limiting the rate of service from the grantee to a neighboring city is subject to the determination of the railroad commission, under the act of 1905, as to its reasonableness.

In reaching those conclusions numerous citations of authorities were given with quotations therefrom. In the aggregate they cover a wide diversity of statutory conditions; some of a police nature, some appertaining to a much broader power, and some, perhaps, of a police and revenue character as well. Perhaps it may appear that some extreme views are expressed in some of the authorities, which upon consideration we might not wish incorporated into our system. Certainly not in so far as they run counter, if at all, to the decisions of this court that power to a municipality to impose burdens on occupations other than such as appertain to police powers, or engraft such burdens upon franchises granted by municipalities acting as state agencies, must be found clearly expressed in the written law.

The citations and authorities referred to mirror the general trend of decisions and logic in support thereof respecting interferences by municipalities with public utility corporations under a variety of conditions, somewhat similar to the one then in hand, without committing this court to all such decisions or such logic.

In the *Manitowoc Case* the power challenged was found very satisfactorily expressed in the statutes. The words "upon such terms," in connection with the words "subject to such rules and regulations" and the additional words "and the payment of such license fees as the common council or board may prescribe," were thought, by necessary inference if not in the letter, to confer power of a broad character,—clearly beyond mere police authority. The first group of words, standing alone, might be held referable to police authority from one viewpoint, but from another much more clearly referable to a broader power, or perhaps to both fields of authority. But the second group refers distinctively to police authority, rather negativing the idea that the first group was used in that field. For the same reason, as well as by the letter, it would seem that the last group refers quite

plainly to other than police power. There are further reasons which might be referred to, in the whole, persuading the court to the conclusion that, in the use of the words "on such terms" under the circumstances, restrictions on rates for service between the city and points beyond might well have been one of the very things the legislature had in contemplation. No such plain language, or any language in fact, conferring other than police power is found in sec. 1780*b* of the statutes without extending the meaning thereof beyond what it seems was the legislative purpose.

The claim that it was beyond legislative power to supersede a contractual arrangement of the nature of the one in question, because of constitutional restrictions, needs but a brief notice.

The revenue element of the old franchise, as before indicated, was inherent in it and so inseparably connected with the privilege emanating from the state under sec. 1780*b* of the statutes. It was added by the municipality, acting as a state agency. The entirety was a state grant and so under legislative control like any other corporate state franchise. If in that situation it could have any contractual features, protected from impairment by constitutional limitations, the only parties thereto were the state and the respondent. They mutually agreed to abrogate the franchise and, necessarily, as we shall see, the incidents attached by the state agency were abrogated likewise. Such mere incidents could not well inferably survive the primary thing.

Whether mere contractual features, as between the state or any instrumentality used by it in conferring special privilege, and its grantee, inhering in the privilege itself, the franchise not being corporate, are within the reserved power to alter, amend, or repeal under sec. 1, art. XI, of the constitution, need not be discussed for the reason stated. What the plaintiff did, if anything of a contractual nature, since it appertained to the franchise itself; the state did. What the two

real parties to the transaction mutually did, obviously, they could mutually undo.

Though we thus leave a subject treated in the briefs of counsel, with passing notice, it is not to be taken as doubting the state of the law on the question. One needs, in respect to it, to distinguish between corporate franchises; in the sense of the right to corporate existence, and corporate franchises, as the term is often, not very accurately used; in the sense of, a privilege owned by a corporation in its proprietary capacity; a thing granted which when accepted is property,—may be acquired or parted with as any other property might, barring special legislative restrictions. *State ex rel. Att'y Gen. v. Portage City W. Co.* 107 Wis. 441, 83 N. W. 697; *Linden L. Co. v. Milwaukee E. R. & L. Co.* 107 Wis. 493, 514, 83 N. W. 851; *In re Southern Wis. P. Co.* 140 Wis. 245, 122 N. W. 801. The distinction has not always been appreciated as witness *State ex rel. Att'y Gen. v. Madison St. R. Co.* 72 Wis. 612, 40 N. W. 487; *State ex rel. Cream City R. Co. v. Hilbert,* 72 Wis. 184, 39 N. W. 326, and remarks with reference thereto in cases cited above and comparison therewith of *Ashland v. Wheeler,* 88 Wis. 607, 60 N. W. 818, and the language of and precise subject dealt with in sec. 1, art. XI, of the constitution.

Counsel cite *Superior v. Douglas Co. Tel. Co.* 141 Wis. 363, 122 N. W. 1023, respecting the foregoing matter; but, if it were not for the mutuality in the transaction in question, that adjudication would not have any bearing on the present case. There the contract was of the same nature as an ordinary agreement *inter partes.* It did not inhere in a franchise, corporate or otherwise. Moreover, it was of the species of private contracts expressly exempted from disturbance by sec. 1797*m*—91, Stats. (Laws of 1907, ch. 499), of the public utility law.

Counsel for appellant, in respect to the subject last dis-

cussed, seems to have failed to appreciate the distinction, clearly marked out by the circuit judge in harmony with the decisions of this court, between the nature and scope of state agency authority in granting public franchises and the granted business capacity of a municipality or other corporation to make contracts as a private person might, within the scope of the municipal power to contract. The distinction is too well understood to warrant enlarging upon it at this time.

If the propositions heretofore discussed were efficiently answerable in favor of appellant there would still remain a question striking at the very foundation of appellant's claim, in that it involves whether the old franchise with its incidents did not cease to exist before commencement of the period for which such claim is made. More labor seems to have been put on this branch of the case by respondent's counsel than any other. It is considered the presentation, under the circumstances, merits such careful consideration as if the matter involved were necessarily vital to the appeal.

This is the question at this point: Is the indeterminate permit, respondent accepted in exchange for its privilege referable to sec. 1780*b* of the statutes, conditioned by appellant as aforesaid,—burdened like the former privilege with the element requiring payment to the municipality of two per cent. of gross earnings "in addition to such other taxes as are provided by law?"

It is not likely the legislature supposed the law authorizing such exchanges of privileges as occurred would, or could, be regarded ambiguous respecting the scope either of the thing surrendered or that given back as an equivalent therefor.

The public utility law has been on the statute books so long that, probably, many franchises like the one in question have been given back to the state for so-called indeterminate per-

mits; there being mutuality of thought as to the status of such permits as regards the complications and uncertainties of the previous situation.

The confusion created during the years preceding the public utility law of 1907 by granting franchises in several different ways,—some directly by the state, some by cities as state agencies, some by the state in the main but with power to the various municipalities as state agencies to add supplementary features, fitting particular situations, some by the state without regard to local police regulations, and some likewise having such regard, either expressly or by necessary implication, some having contractual features creating doubt in regard to their constitutional status, and some having such features but without doubtful character, many of such matters being, in the ultimate, more or less detrimental to consumers, whether public or private, and proprietors as well,—in the whole, created a perplexing situation in respect to harmonious administration. The legislature sought to deal efficiently with this mixed situation, the growth of years, by taking over existing franchises with the consent of owners, compensating them for co-operating to that end by conferring in each case of surrender a new franchise to do the things privileged under the old one with conditions referable only to the law itself, and so providing that subsequent original franchises conferred in whole or in part through state agencies would be likewise referable. The traffic thus sanctioned and invited as to existing franchises has been considerable and, as said before, with definite mutual ideas as to the status resulting from the exchange. The property interests involved have doubtless been very great, the number of persons directly and indirectly interested large, and the transactions numerous as well. Obviously any construction of the law running counter to the general view entertained in such transactions should be avoided if practicable.

If we concede, for the case, that, in a reasonable view, the

public utility law is ambiguous, looking only at its words, we cannot well so say in the light of the situation the legislature dealt with, as indicated, and the new condition which was evidently desired. It is evident the aim was to displace existing public utility franchises of the nature of those mentioned in the act, so far as that could justly be accomplished, by new direct grants from the state of a uniform character, free from the peculiarities of old franchises, prejudicial to the dominant end in view; the best service practicable at reasonable cost to consumers in all cases and as near a uniform rate for service as varying circumstances and conditions would permit; a condition as near the ideal probably as could be attained.

It is useless to extend this opinion further for the purpose of picturing the situation dealt with by the legislature. The magnitude of the task was great. Few, if any, greater have been dealt with in our legislative history. The result stands significant as a monument to legislative wisdom. That such a complicated situation has been met by written law in such a way as to avoid successful attack up to this time on the validity of the law or any part of it, and avoid attack at all either upon the law or its administration, except in a very few instances, and secure optional submission by many owners of old franchises to a displacement of their privileges,—is quite a marvel; reflecting credit upon the lawmaking power and the body charged with the onerous duty of administering the statute, and challenging judicial attention to the importance of not, by construction, reading out of the enactment any meaning not clearly found there,—even to avoid a seemingly unlooked for disturbing consequence in a particular instance now and then,—which would tend to defeat the object of the law. The words of the enactment, dealing as it does with vast private and public interests, should, if practicable, be given a meaning so definite and comprehensive as to prevent any attempt to restrict it or extend it, so as to con-

tinue or renew or promote the detrimental consequences it was aimed to abolish and prevent.

In view of the foregoing let us turn to these words in sec. 1797*m*—77 (Laws of 1907, ch. 499) of the public utility law:

"Any public utility, being at the time a corporation duly organized under the laws of the state of Wisconsin, operating under an existing license, permit or franchise shall, upon filing at any time prior to the expiration of such license, permit or franchise and prior to July 1, 1908, with the clerk of the municipality which granted such franchise and with the commission, a written declaration legally executed that it surrenders such license, permit or franchise, receive by operation of law in lieu thereof, an indeterminate permit as provided in this act; and such public utility shall hold such permit under all the terms, conditions and limitations of this act. The filing of such declaration shall be deemed a waiver by such public utility of the right to insist upon the fulfilment of any contract theretofore entered into relating to any rate, charge or service regulated by this act."

Does not that language tell, without judicial aid, its own plain story, contemplating as to old franchises, in their entireties, a complete severance of all relations between sovereign authority,—whether exercised directly or through municipal agencies,—and the owners of the franchises, by an optional exchange of old ones for new ones, equivalent as to the privilege element, denominated indeterminate permits. There is no suggestion in the statutes of coercion, no hint of a purpose to take away from franchise owners anything other than by their consent; exchanging in each case a privilege with new incidents for an old one with its incidents; a complete change from an existing to a new condition.

The idea that in case of an exchange under the statute any incident of the former privilege inherent in and forming a part of it in the nature of mutual obligations between the

parties by reason of contractual features or otherwise,—except as to mere police regulations, not of course inconsistent with the act, surviving the change,—was not left readable out of the legislative scheme by judicial construction. *Ex industria* the legislature said, "the filing of such declaration shall be deemed a waiver by such public utility of the right to insist upon fulfilment of any contract theretofore entered into relating to any charge or service regulated by this act." All such matters were henceforth to be referable to the public utility law under the supervision of the state commission. Such statute was made unmistakably exclusive as to everything affecting the service, its character, and charges therefor to consumers, whether public or private. The extinguishment of the obligatory features of the old franchise as to one side by necessary inference operated to extinguish such features as to the other. Such must have been the legislative purpose.

The old franchise in question, like such franchises in general, contained many provisions relating to rates, charges, and service, and in close significant connection therewith and having, doubtless, a material bearing thereon, the obligation to pay the municipality the stipulated two per cent. on gross earnings. The tax, so called, could not come otherwise than from consumers and, therefore, to that extent enhance the cost of service to them. That burden had in the old grant, necessarily, compensatory features affecting rates. In the very nature of things the different features were not justly separable as they are not in case of franchises in general. So they were dealt with by the legislature as entireties, and the declaration as to the effect of the surrender of an old franchise was doubtless made to render that feature of the exchange from the old to the new condition unmistakable. Other provisions were added to the law in harmony therewith as we shall see.

The ultimate end aimed at is clearly indicated in sec. 1797*m*—3 in these words:

"Every public utility is required to furnish reasonably adequate service and facilities. The charge made by any public utility for any heat, light, water or power produced, transmitted, delivered or furnished, . . . shall be reasonable and just, and every unjust or unreasonable charge for such service is prohibited and declared unlawful."

The scope of the new species of franchises, whether created by automatic operation of sec. 1797*m*—77, or otherwise by direct or indirect state grant, or both, was clearly defined by sec. 1797*m*—1, subd. 5, in this language:

"The term *'indeterminate permit'* . . . shall mean . . . power, right or privilege to own, operate, manage or control any plant or equipment or any part of a plant or equipment within this state for the production, transmission, delivery or furnishing of heat, light, water or power, either directly or indirectly, to or for the public."

The means for bringing all existing franchises of the nature referred to under the uniform system was clearly prescribed in sec. 1797*m*—77, as before indicated, and the exact nature of the rights given for old franchises was defined by the words "shall . . . receive by operation of law in lieu thereof, an indeterminate permit . . . ; and such public utility shall hold such permit under all *the terms, conditions and limitations of this act.*"

Note the language; by necessary inference negativing the idea that the legislature contemplated the so-called indeterminate permit would be subject to any condition or limitation such as the two per cent. feature in question or any other of surrendered grants. No limitation or condition was in legislative contemplation, except those "of this act," and except, manifestly, the scope of the privilege itself, and ordinary police regulations. Such privilege, it was thought, obviously, would be measured by the general purpose of the sur-

rendered franchise. That seems plain because the idea was, the exchange of a privilege held upon specified conditions and limitations named therein or attached thereto for a new one of equal dignity subject only to "the terms, conditions and limitations of this act."

So the thing existing after consummation of an exchange upon which respondent's business was dependable, was the new privilege, emanating directly from the state, denominated an "indeterminate permit;" a permit to do the things theretofore licensed directly by the state and through the municipality as a state agency, but now unconditionally, except as specified in the public utility law. That it seems was the view of the administrative board in advising the public under date of June 11, 1908, that a permit obtained through operation of the public utility law is as broad as the franchise surrendered. Report of R. R. Comm. 1908, p. 488. The idea suggested is that the new thing, as to the activities privileged, is like the old one and referable thereto, as to the scope of the privilege, and referable to the statutes as to conditions and limitations, thus cutting off all previous interferences inconsistent with such statute. Other administrative suggestions of the commission convey the same idea in letter or spirit.

The foregoing is evidenced by the character of the order of the commission considered by this court in *Superior v. Douglas Co. Tel. Co.* 141 Wis. 363, 122 N. W. 1023, treating a contract between a public utility corporation and the municipality as superseded by the statute. The decision by the commission was overruled but upon the ground, among others, that the arrangement between the corporation and the city was no part of the franchise; that it was like an ordinary contract which the city and the corporation had power to make in their business capacities.

Inferentially the court held that, except for the fact that the transaction—which was especially burdensome to the corporation—was not one inhering in the public franchise itself

and was of a class especially excepted in the public utility law,—the commission's view of such law was right.

The logic of the decision in *State ex rel. Kenosha G. & E. Co. v. Kenosha E. R. Co., ante,* p. 337, 129 N. W. 600, wherein the scope of the creation called an "indeterminate permit" and the purpose of the law in question was stated, is in harmony with the foregoing.

Any other meaning of the statute than indicated, it seems, would be contrary to its letter and spirit. The idea that the voluntary surrender of a franchise, containing burdensome conditions and involving complications prejudicial to attainment of the object of the invitation to franchise owners to make the exchange and their object in accepting the invitation,—still leaves such perplexities with efficient vitality attaching thereto and making them a part of the new privilege given for the old one, is so apparently out of harmony with the legislative scheme that unmistakable language to that effect would be required to warrant convicting the legislature of so intending. We find no such language, as we have seen, while, on the contrary, we find quite plain language and the whole spirit of the legislative plan negativing that idea. Doubtless, we reiterate, it was thought that sound policy required old franchises with their multiplicity of differences to be brought under one system so that the things formerly privileged might continue to be so but solely under conditions and limitations referable to a single standard, to wit: the public utility law, with its administrative board to dominate the situation as between the owners of privileges and the public, to the end that each might be coerced, if need be, to deal justly with the other, accomplishing an era of fair exchange of equivalents involving service being furnished customers of the best character and at the lowest price practicable and without discrimination, and rendition therefor of such just and reasonable compensation as under the circumstances of each situation would enable performance of the mutual obli-

gations practicable. To that end the idea evidently was, as indicated, to so disestablish existing conditions as to remove all special rates, favoritisms, and burdens interfering with each customer, on an even plane with any other under like conditions, obtaining service on the basis of reasonable cost plus reasonable profit on account of investment, and unenhanced by anything out of the ordinary in the nature of special features in old grants such as the one in question and, as said before,—referable only to the conditions and limitations of the public utility law.

To round out the plan aforesaid, it seems, making a complete system, encompassing future as well as existing conditions, old franchises were dealt with in one group giving them competency for exchange for new ones to be held subject to "the terms, conditions and limitations of this act," and others were dealt with in a second group, by providing in sec. 1797*m*—76, that every future grant "shall have the effect of an indeterminate permit subject to the provisions of this act;" power was given to municipalities, in general, in sec. 1797*m*—87, "to determine by contract, ordinance or otherwise the quality and character of each kind of product or service to be furnished or rendered by any public utility furnishing any product or service within said municipality and all other terms and conditions *not inconsistent with this act,* upon which such public utility may be permitted to occupy the streets or other public property within such municipality," subject to condemnation in whole or in part as void in case of the administrative board determining in due course "the contract, ordinance or other determination" to be unreasonable.

Thus all the features of the law having to do with uniformity to effect the purposes mentioned in sec. 1797*m*—3 were made to characterize future original grants in sec. 1797*m*—76 by the words "subject to the provisions of this act" and to characterize all franchises given in exchange for

old ones by the words of sec. 1797*m*—77 "shall hold such permit under all the terms, conditions and limitations of this act." All were given the name "indeterminate permit," the scope being defined by sec. 1797*m*—1, subd. 5, having regard, as stated, as to franchises exchanged for existing privileges, to the scope of the latter privilege in each case and such features were likewise made to characterize future arrangements between franchise owners and municipalities by the words of limitation in sec. 1797*m*—86 "not inconsistent with this act." All are grouped around the one dominant purpose declared in sec. 1797*m*—3 to be effectuated, making a harmonious scheme to that end; harmony in letter and spirit pervading the whole enactment.

The foregoing analysis of the public utility law seems to demonstrate that retention of the special feature of the surrendered franchise in question as a feature of the new one, differentiating it from indeterminate permits in general, affording appellant, really at the expense of consumers, the benefit of two per cent. of respondent's gross earnings, is plainly inconsistent with "the terms, conditions and limitations" of the public utility law which, as we have seen, it is declared over and over again therein shall characterize every indeterminate permit whether an original grant or a privilege given for an old franchise.

It follows that the order overruling the demurrer to the defense must be affirmed and the one overruling the demurrer to the counterclaim affirmed as well.

By the Court.—So ordered.

BARNES, J. (*dissenting*). Sec. 1863, Stats. (Supp. 1906: Laws of 1901, ch. 425), empowers street and interurban railroad companies to run cars in the streets "with the consent of the common council." Such consent "shall be given by ordinance, and upon such terms and subject to such rules and regulations and the payment of such license fees as the com-

mon council . . . may prescribe." In the case of *Manitowoc v. Manitowoc & N. T. Co., ante,* p. 13, 129 N. W. 925, the decisions of various courts involving statutes substantially like that quoted were reviewed, and the conclusion was reached that under such a provision the city might impose upon a public utility, as a condition upon which its streets might be used, any terms that were not in themselves unlawful. Sec. 1780*b,* Stats. (1898), being the statute here involved, provides that an electric light corporation may use the streets of a city "with the consent of and in the manner agreed upon with the authorities of" the city.

I fail to see where there is any material difference between the provisions of those two statutes and why they are not *in pari materia* so that one should receive the same construction as the other upon the question under consideration. The exaction in the case before us was denominated a tax in the ordinance, but in reality the transaction amounted to an agreement upon the part of the defendant to pay the amount stated for the privilege of using the streets of the city. There was no law prohibiting the city from entering into such an agreement, and I think the city had a perfect right to make it, and the defendant likewise was of the same opinion else it would not have paid the tax for a long series of years. It seems to me to be a mistake to say that the provision quoted from sec. 1780*b* confers only the police power of regulation on cities. Cities under the general police powers conferred on them had this power irrespective of such provision. *State ex rel. Wis. Tel. Co. v. Sheboygan,* 111 Wis. 23, 86 N. W. 657; *Wis. Tel. Co. v. Milwaukee,* 126 Wis. 1, 104 N. W. 1009; *State ex rel. Smythe v. Milwaukee Ind. Tel. Co.* 133 Wis. 588, 114 N. W. 108, 315. Under the grant of general police power a city could not prohibit a public utility operating under a franchise from the state from using its streets. It could only regulate such use. *State ex rel. Wis. Tel. Co. v. Sheboygan, supra.* Does any one doubt that under sec. 1780*b*

the right to use the public streets might be denied to a lighting company organized in the manner provided in that section? Wherein is the difference between the expression "with the consent of . . . and upon such terms" as may be prescribed, in the one statute, and the phrase "with the consent of and in the manner agreed upon," in the other? In either case the city may refuse its consent; in either case there must be an agreement between the parties; and in either case, as I view it, they may agree upon any terms that are not in themselves unlawful.

It seems to me we are in effect though not in words overruling the *Manitowoc Traction Company Case* almost before it has had time to get to the printer. So I feel impelled to dissent from the view of the court herein that this ordinance was invalid in its inception in so far as it required the defendant to contribute two per cent. of its gross income to the city. I also disagree with the other proposition decided in the case.

The indeterminate permit provided for by ch. 499, Laws of 1907, is nothing more nor less than a franchise. That law confers no franchise upon public utilities. Prior to its passage franchises were granted to some public utilities directly by the state by virtue of certain statutes, the statutes defining the nature and extent of the right conferred. Since the passage of the law, franchises, now called "indeterminate permits," are conferred under these identical statutes. Prior to the passage of the law certain other franchises were conferred by local municipalities acting under delegated power from the state. Since its passage indeterminate permits are granted by these local municipalities under this same delegated power. The former statutes under which franchises were granted have been amended in some particulars by the public utilities law. Formerly a time limit was usually fixed. Now franchises are perpetual, subject as before to the legislative right of repeal. All corporations ac-

cepting indeterminate permits by so doing agree to sell the utilities which they own in the manner provided by the 1907 law. Before its enactment they were not compelled to do so. Where a public utility is acting under an indeterminate permit the local municipality cannot grant a permit to another corporation to engage in the same line of business, unless a certificate is obtained from the railroad commission stating that the public convenience and necessity demand that the second utility be authorized to go into competition with the older corporation. These in the main are the modifications of existing laws in relation to the granting of franchises that were made by the public utilities law. We must still go to the statutes in existence when that law was passed to ascertain the scope and extent of the powers conferred on corporations receiving an indeterminate permit since ch. 499, Laws of 1907, became effective, if the permit comes directly from the state. If it comes from a local municipality we must examine the statute delegating the power to such municipality to grant the particular franchise and to the ordinance passed by virtue of the statute, in order to arrive at the scope of the powers conferred.

Except as the power of a city to impose terms as a condition of granting the right to use its streets is expressly or by reasonable implication taken away by the 1907 law, it exists to the same extent that it did before. There is no express provision in the law abrogating such power, and I am unable to see where there is any repeal of these former statutory provisions by implication. There are some obvious advantages in placing the construction on the public utilities law that has been placed thereon in the majority opinion of the court, but this does not argue that the legislative intent has been expressed in that opinion. Laws are frequently the result of compromises between conflicting interests. It is a matter of history that the public utilities law as originally drafted was opposed by many of the cities in the state because it would

take away from them the right to determine questions that were assumed to be of local interest only. It was in response to this opposition that sec. 1797*m*—87, Stats. (Laws of 1907, ch. 499), was incorporated in the law, which section reads as follows:

"Every municipal council shall have power: (1) To determine by contract, ordinance or otherwise the quality and character of each kind of product or service to be furnished or rendered by any public utility furnishing any product of [or] service within said municipality and all other terms and conditions not inconsistent with this act upon which such public utility may be permitted to occupy the streets, highways or other public property within such municipality, and such contract, ordinance or other determination of such municipality shall be in force and *prima facie* reasonable."

Here we have an express declaration that cities may prescribe the terms and conditions under which a public utility may be permitted to use its streets, provided such terms are not inconsistent with said ch. 499. I fail to see where there is a single requirement of the public utilities law that might not be carried out to its full extent if we were to hold the provisions of the defendant's franchise valid and binding in regard to the payment of the money involved. No provision of that law is pointed out that would conflict with this provision of the ordinance. There is no satisfactory reason why cities may still grant rights and privileges under statutes existing when the public utilities law was passed, but must not couple these rights and privileges with conditions which they are empowered to impose by these same statutes.

Considerable stress is laid on sec. 1797*m*—77 of the law, which relates to the surrender of its franchise by an existing corporation. It is very apparent that the legislature did not intend to differentiate between an existing corporation electing to come under the law and a new corporation organized after its passage. Where there is a surrender of an existing franchise the corporation receives in lieu thereof an inde-

terminate permit which confers all the rights and imposes all the obligations that were conferred or imposed by the franchise surrendered, except in so far as these rights and liabilities are modified by the public utilities law, and where such law makes no modification of the obligations imposed they remain in full force.

KROGER, Appellant, vs. CUMBERLAND FRUIT PACKAGE COMPANY, Respondent.

February 4—March 14, 1911.

Trial: Direction of verdict: Review on appeal: Master and servant: Dangerous machinery: Duty to guard: Injury to servant: Contributory negligence: Questions for jury: Incredible testimony.

1. Upon a motion to direct a verdict the trial court must determine as a question of fact whether the evidence in any reasonable view would warrant any other conclusion, and if satisfied that it would not should direct the verdict.
2. In directing a verdict under such circumstances there is no invasion of the province of the jury.
3. The trial court's decision of the question of fact arising upon a motion to direct a verdict should not be disturbed on appeal unless clearly wrong.
4. A difference of opinion among the justices of the appellate court upon the question of fact involved does not preclude a holding that the trial court was right in directing a verdict.
5. The duty to fence or guard dangerous machinery does not extend to parts thereof so located that in order to reach the region of danger a person must depart from any way which he could reasonably be expected to take.
6. In an action for personal injury to a servant, his positive testimony that he did not know there was danger in the place in which he put his hand does not necessarily make the question of his contributory negligence one for the jury, where the circumstances so clearly overcome such testimony as to render it not in reason believable.

7. Upon evidence showing, among other things, that plaintiff was a man fifty years old and in full possession of his faculties, of ordinary intelligence, and with some experience in operating dangerous machinery containing revolving cylinders, though none with respect to a planing machine; that without instruction as to the operation of the machine he was put to work in defendant's factory, feeding boards into a small planer having a single revolving cylinder armed with knives, protected in front and over the top but open at the back to permit the escape of shavings; that after working about five hours with full opportunity to observe, from the operation of the pulleys and belts connected with the machine, the noise and vibration resulting from its operation, and the stream of shavings thrown therefrom, as well as its effect on the boards, that a powerful cutting mechanism was revolving within a very narrow zone, although the knives were invisible when running at full speed, he attempted, unnecessarily, to brush away with his hand the shavings that accumulated on a metal bar just back of the cylinder, and was injured by the knives,—it is *held* that there was no error in directing a verdict for defendant either on the ground that no actionable negligence was shown or on the ground that plaintiff was conclusively shown to have been guilty of contributory negligence, although he testified that he did not know that knives were revolving in the region where he placed his hand.

APPEAL from a judgment of the circuit court for Douglas county: FRANK A. ROSS, Circuit Judge. *Affirmed.*

Action to recover for a personal injury. Plaintiff stated these facts as a ground for recovery:

A few days prior to April, 1910, plaintiff entered the service of defendant as a common laborer in its factory. On that day he was put to work at a planer. His duties in the main were to stand at the front end of the planer, take short boards from a bolting saw near by, and feed them into the machine. Such machine was equipped with a rapidly revolving arbor to which there were two knives suitably attached which surfaced boards as they were passed under them. The knives were about two and one-half feet long set on the arbor, that being located crosswise of the planer frame far enough above the same to allow the boards to be pushed

under it as it was in motion and about four feet from the front of the table. The knives and arbor formed a shaft about two inches through. When it was in rapid motion the knives were not visible as extending outward from the surface of the shaft. On the opposite side and above the knife cylinder it was entirely unguarded. When the cylinder was in motion the knives were not observable by a person located as plaintiff was in the performance of his duties. The rapidly revolving instrumentality where exposed, was entirely unguarded or fenced and so located as to be dangerous to a person required to feed the machine, who was unacquainted with its mechanism and operation. Plaintiff was ignorant in that regard. No instruction was given him in respect thereto. He did not know how the planing was accomplished or that there was danger of personal injury attending the brushing away by hand of shavings from the top of the planer or in front of the revolving knives, while he supposed such brushing was proper. It was practicable to have guarded the knives so as to prevent the operator's hand coming in contact therewith. Plaintiff, after having been engaged at the work about two hours, in the exercise of ordinary care attempted with his right hand to clear away sawdust which had accumulated on top of the planer, when such hand came in contact with the knives and was so injured that it had to be amputated close to the wrist. By reason thereof he was damaged in loss of time, expenses for medical and surgical attention, pain, and permanent disability in the sum of $20,000.

Defendant answered, among other things, putting in issue all plaintiff's charges of negligence, denying he was hired as a common laborer, alleging that when plaintiff sought employment he represented himself to be competent to perform any work in and about the factory which might be assigned to him, alleging that in fact he was notified he would be required to operate machines; that he chose the particular work

on the day in question, had done such work before and been doing it on such day nearly the whole of the time; that the knives were covered over the top for the protection of operators, were necessarily exposed on the back side to permit of escape of shavings and of the work being done but without presenting any danger to the feeder in the exercise of ordinary care. The injury and manner in which it was produced were admitted, but it was pleaded that plaintiff was a man of mature years, knew of the general features of the planer; that it was dangerous to place his hand in the vicinity of the knives, and that he was injured by his own want of ordinary care.

The evidence was to this effect: Plaintiff was injured as alleged. He was about fifty years old and had lived in this country nearly thirty years. By occupation he had been, most of the time, a farmer. He had worked considerably about machinery and helped operate the same on some occasions although he had not had any experience in operating a planer. He had worked with threshing machines, observed the motion of cylinders, and heard the noise produced by such machines. He had worked with a bolting saw and knew the manner in which rotary motion, such as was necessary with the planer, was produced. He knew that such attachments as characterized the planer, produced such motion. The knives were observable by casual observation when the planer was not in operation. He had been near it on several occasions when it was so circumstanced and knew the change wrought in the material he handled by passing the same through the machine. He had observed as a board went through that shavings were taken therefrom and thrown with much force from the far side of the cylinder location. He was aware that some feature in the narrow zone which formed the space entirely obscured from view between where the end of a board disappeared as he fed the planer and came into view on the other side exerted much power in respect to it,

causing much noise and trembling of the planer frame and throwing out of the shavings. While, as he fed the machine he could not observe the revolving knives he, nevertheless, took a location and assumed an attitude where he could and did put his mittened right hand over and into the place from which he observed the shavings thrown out and attempted to brush off such as accumulated on the pressure bar, extending out a little way from the revolving cylinder, and just near enough on the back side to escape it. He knew it was unsafe to put his hand into a rapidly revolving cylinder, armed with teeth or anything of that nature. He knew—by the noise of the planer when in motion and the effect upon a board fed in, the throwing of the shavings, the deposit of shavings on the planer behind the knives at the point where he attempted to brush them off, the similarity of the sound to that of a threshing machine cylinder and other circumstances—that there was a sharp cutting mechanism within the narrow space of some two or three inches between where the boards he fed into the planer came in contact with the revolving shaft and the point of emergence on the back side; that something operated on top of such boards to produce the effect which was in evidence, constantly, when the machine was in operation. He knew that there was a rotary motion to the shaft on which the knives were placed and that it was very rapid, something like a threshing machine cylinder. There was a set of live rolls in front of and some little distance from the knives. From the top of the cylinder over and down in front about to the point to where the boards engaged the knives, there was what was called the chip breaker. That and the rolls so obscured the knives that a person standing at the front of the table could not see them, but standing a little on either side they were observable when the machine was idle and the revolving body was observable when in operation. Plaintiff worked about the planer some before he was injured. He carried boards thereto from the bolting

saw, laying them conveniently for the feeder. He had been feeding the planer for about five hours before he was hurt. Before he took the work the machine and bolting saw were placed near together so the one who fed the former could take boards from the latter. Back of the knives there was a metal strip, two or three inches wide, called a pressure bar under which the boards ran as they left the knives. The bar sat down on the boards and the knives revolved just back of and came a little above it. On this bar shavings would accumulate to some extent. They could be left there, or be removed by using a stick. There was some dispute as to whether there was need of attending to this feature. The evidence quite satisfactorily showed there was none. As plaintiff stood in doing his work at the front of the table some four or five feet from the knives, he operated by taking a board at a time from the bolting saw, or near by it, laying the board on the table and pushing it forward till it engaged the front rolls by which it was carried to an engagement with the knives and through under the pressure bar to an engagement with the back roll, by which after leaving the front one it was moved on till released therefrom when it was removed by the back tender. Plaintiff had observed shavings and dirt accumulate on the pressure bar. Several times he had reached over and brushed off the shavings with his mittened right hand. In doing so he put his hand over and down at a point somewhat out of his line of vision and close to the knives. No one had told him to do that. He had not seen any one do so. He had no knowledge as to whether it was necessary to do so or not. He observed that the planer did its work right along whether the shavings were brushed from the pressure bar or left to remain there. In making the movement mentioned his hand invaded the cylinder zone and was destroyed. He said he knew there was something between where the boards went in and where they came out which did the work, but did not know it was revolving knives; that he had never ob-

served them, though he had, as he put in a board, always seen the shavings fly with force from the back side of the cylinder region where the board came out; that he did not know it was dangerous to do what he did and that no one had explained the matter to him in any way; that he saw the result and the appliance which he knew produced rotary motion but did not know what produced the shavings, particularly that it was the cylinder armed with the revolving knives.

At the close of the evidence, on motion, the court directed a verdict in defendant's favor. Judgment was rendered accordingly.

Victor Linley, attorney, and *Ludvig Arctander,* of counsel, for the appellant.

For the respondent there was a brief by *Coe Bros.* and *Briggs, Thygeson, Loomis & Everall,* and oral argument by *A. G. Briggs.*

MARSHALL, J. From the foregoing it will be seen the situation, in brief, which the trial court had to face on the motion to direct a verdict was this: Appellant—at the zenith of maturity for one of his class, a man of some experience working around dangerous machinery and of ordinary opportunity for observation respecting the same and of ordinary intelligence, in the full possession of his faculties, but without experience in operating the particular machine or having had instructions in respect thereto—was put to work feeding boards into an ordinary small planer of ordinary construction. It had but one cutting head of small diameter, armed with two knives, observable from the front when idle and from the sides when in operation and open to fair view from the back. Whether viewed from any point, on account of rapidity of motion, the knives were so invisible even to the practiced eye as not to be appreciated. The cylinder was covered over the top and down in front to about where an opening was necessary to permit of boards being fed in, and

uncovered at the back to permit of their passing and the shavings escaping. For the purpose of removing an accumulation of the latter from a pressure bar placed just back of the cylinder, with the upper surface below the top thereof, plaintiff, from a position at the side and towards the front of the machine, with his mittened right hand, reached over and into the zone of the cylinder, above and at the back of the pressure bar, and was injured. Under such circumstances, can it reasonably be said respondent was actionably negligent proximately causing such injury? Moreover, can it reasonably be said appellant was free from contributory negligence notwithstanding his testimony that he did not know the knives were revolving in the region where he placed his hand, in view of the fact that he saw the effect upon the boards as he fed them through the planer, that a stream of shavings was thrown constantly back from such region, accompanied by a sharp noise from the cylinder region, and he observed and knew the use of the appliances which produced rotary motion?

By the motion to direct a verdict the propositions suggested were presented to the trial court for solution. They, in a sense, involved matter of fact, but not all such are for jury solution. It almost seems a work of supererogation to speak of such elementary matters, but—witnessing, as we do, from time to time, apparent want of appreciation that a motion to direct a verdict is as legitimate as any matter of practice in the administration of justice; that it may rightly be made in any case; that it is advisable to make it in many cases; that to make it is a professional duty in some cases; and that whenever made a judicial duty clearly devolves upon the trial judge to decide the matter and, if satisfied that the evidence in any reasonable view will not warrant but one conclusion, a clear judicial duty to direct a verdict (*Finkelston v. C., M. & St. P. R. Co.* 94 Wis. 270, 68 N. W. 1005; *Cawley v. La Crosse City R. Co.* 101 Wis. 145, 77 N.

W. 179; *Chybowski v. Bucyrus Co.* 127 Wis. 332, 106 N. W. 833),—it is thought to be appropriate, even if there be no real necessity for it, to speak of some fundamental principles of our system of jurisprudence which are involved.

Upon the motion in this case the trial judge was asked to decide whether, conceding the evidence to establish in plaintiff's favor to a reasonable certainty all it tended to establish, could men of the age of discretion, of ordinary intelligence, reasonably differ respecting the proper conclusion to draw? Or to put it another way, Was there room in the evidence for conflicting reasonable inferences? Or, as it has been many times put by this court, Was the evidence so clear and convincing one way as to leave no room for unbiased and impartial minds to come to more than one conclusion; or so clear and conclusive as not to admit reasonably of any opposing inferences in unbiased and unprejudiced minds? *Powell v. Ashland I. & S. Co.* 98 Wis. 35, 73 N. W. 573.

It matters little, if at all, which of the foregoing phrasings is used. They all mean the same thing though, it is true, one is liable to be so strongly impressed with one way as to be disposed to criticise or condemn, others. That may come from the stronger conviction respecting manner of stating the principle than respecting the real logic of the principle itself.

Strictly speaking, the inquiries suggested involve consideration of matter of fact though it is often spoken of as if solely matter of law. *Powell v. Ashland I. & S. Co., supra.* It does not seem difficult to grasp the idea that the question—Does the evidence as matter of law establish the fact one way so conclusively as to exclude every reasonable ground for finding it to be the other? requires one to go back to the question of whether there is room in the evidence for jurors to reasonably differ. That in the broad sense is matter of fact which the court must decide as has been frequently suggested. In every jury trial the court by the very act of submitting the case to the jury impliedly decides there is room in the evi-

dence for conflicting reasonable inferences. There is no legitimate way of escape from the duty of deciding such a question when properly challenged in respect thereto. It is purely a judicial matter. In dealing with it, properly, there can be no usurpation of jury functions. Such functions are well defined. They do not deal with any situation except those where there is some room for reasonable doubt as to the truth of controverted matters of fact. Up to that point the trial judge is supreme. Beyond that the jury takes hold. In the latter field the jury draw the proper inference from the reasonable conflicts. In the former the judge declares the one reasonable inference and, as matter of law, because in contemplation of law when the truth is ascertained by that test it is truth infallible so far as our judicial system goes.

We are not unmindful of the fact that there is a sentiment, indulged in by some, that, since the propositions under discussion involve whether minds may reasonably differ, it is illogical to decide in the negative where men confessedly up to the plane of ordinary comprehension do in fact honestly differ; that it involves the idea, from the viewpoint of those on one side, that those on the other are either not of ordinary comprehension or do not reasonably differ. Such indulgence in such sentiment loses sight of the fact that judges must decide judicial questions including those under discussion. They are under solemn oath to do so. They cannot fail in performance according to their honest convictions without violating such oaths and manifesting unfitness for the great trust reposed in them. While the result at times may be that the judgment of one has, from a technical viewpoint, a cast of convicting an equal of not reasonably differing—of concluding contrary to rules of common sense—in the broad field of judicial work judicial instrumentalities rarely if at all have any such idea. But the situation giving rise to such cast or tending that way in the mind of anybody should, as it doubtless does, strongly constrain to prevent

such result though that cannot legitimately go to the extent of justifying or excusing one in deciding contrary to his own firm convictions. To do so would violate one's oath of office and the plainest principles of judicial duty.

So mere fixed differences of opinion even among judicial peers as to the law or as to the facts cannot necessarily stand in the way of a decision that there is no reasonable ground for such differences. That is evident in decisions by divided courts in all jurisdictions and in all ages. It is a part of our system which courts have no right to change. It calls loudly, and ought always efficiently, on those charged with official duties to agree if they reasonably can without violating their convictions, but when that cannot be done to each observe strictly his official obligation and however forcibly he may present his views to have due regard for the opinions of others, including that of the trial judge who has always the best opportunity to determine any matter dependable upon human testimony.

So the trial court, necessarily, determined the question in this case of whether there was room in the evidence for unbiased minds to reasonably differ in regard to the truth respecting the vital issues. It matters not that the jury might have come to a different conclusion. It was not within their function to pass on that question as we have seen.

The question as it comes here is not presented as an original one. It might appear from the printed record alone that a different decision below could well have been reached and yet an affirmance follow, since to warrant a reversal it must appear that the decision complained of is clearly wrong. *McCune v. Badger,* 126 Wis. 186, 105 N. W. 667. As there said, "the law rendering it obligatory to decide the question of fact upon a motion for a nonsuit or a verdict in view of the consideration due the trial court's decision gives dignity thereto entitling it to prevail, unless upon the record it appears to be clearly wrong." So in case of some reasonable

doubt in such a situation the obscurity should be resolved in favor of sustaining the court below.

Under the foregoing rule and numerous adjudications of this court in similar situations to the one we have here, can it fairly be said the trial court was manifestly wrong in holding that there was no actionable negligence in failing to guard the cylinder of the planer at the back side thereof out of reach, as it was, of the operator in the ordinary course of his duties, and reached only by his actually going somewhat out of his way and putting his hand into the zone of the revolving knives,—into a place where no one had instructed him to interfere and into which he had never seen any one else put his hand or attempt to do anything of the nature he attempted to do? It has been frequently held that the duty to fence or guard does not extend to machinery features so located that one would have to depart from any way which could reasonably be expected in order to invade the region of danger from it. *Powalske v. Cream City B. Co.* 110 Wis. 461, 86 N. W. 153; *Miller v. Kimberly & Clark Co.* 137 Wis. 138, 118 N. W. 536; *Houg v. Girard L. Co.* 144 Wis. 337, 129 N. W. 623.

Again, can we well say the trial court was clearly wrong in holding that, notwithstanding the testimony of plaintiff as to his ignorance of there being revolving knives in the region where he put his hand, that he must have known of it, or ought to have known of it, especially in view of the many situations of similar character where it has been held that similar circumstances so clearly overcome the evidence of the claimant as to render it of so little probative force as not to create a conflict for solution by a jury. *Dougherty v. West Superior I. & S. Co.* 88 Wis. 343, 60 N. W. 274; *Roth v. S. E. Barrett Mfg. Co.* 96 Wis. 615, 71 N. W. 1034; *Groth v. Thomann,* 110 Wis. 488, 86 N. W. 178; *Horn v. La Crosse Box Co.* 123 Wis. 399, 101 N. W. 935; *Horn v. La Crosse Box Co.* 131 Wis. 384, 111 N. W. 522; *Gardner v. Paine L.*

Co. 123 Wis. 338, 101 N. W. 700; *Schmitt v. Hamilton Mfg. Co.* 135 Wis. 117, 115 N. W. 353.

Those and many other cases are each so strikingly like this one that either might be referred to seemingly as a ruling authority. In the aggregate they come as near establishing a definite principle governing such cases as this, as one could expect to have in the law of negligence; dealing as it does with situations each differing, at least slightly, from the other.

In all or nearly all the cited cases the same feature will be found which we have here and upon which appellant most relies, viz.: the positive testimony of the claimant that he did not know there was a rapidly revolving cutting or other instrumentality creating danger in the zone where he put his hand. In each it was insisted that such story, positively told and persisted in, raised a jury question. In each it was held that the story was not in reason believable and so did not create a conflict with the circumstances showing that the witness in fact did know, or at least as a man of ordinary common sense he ought to have known, of the danger he encountered. In these cases it is stated over and over again, in one form or another, that when all reasonable probabilities arising from physical situations, natural laws, or common knowledge of ordinary persons, are so clearly one way as to leave no reasonable ground in the minds of reasonable men of ordinary intelligence to have any fair doubt about the matter, evidence from the mouth of one or more witnesses contrary to the obvious truth does not create a conflict for solution by a jury. Sometimes that doctrine will be found phrased one way and sometimes another. All mean the same and all convey the same idea as will be appreciated upon examining the matter from the viewpoint of the logic of the principle itself. The greatest danger of its not being legitimately applied lies in obscurity being created by favoring one set way of phrasing it to the extent of doubting another meaning just the

same and perhaps more easily understood by many, if not the majority, having to do with the matter. Truth does not change its character by mere changes in groupings of words used to express it for its immortality is inherent. One may picture it one way and another by a different method according to differing mentalities, temperaments, and conceptions. The pictures may differ in refinement but be, just the same, pictures of the one infallible thing.

We must face the situation here that plaintiff was of mature age and of ordinary intelligence in full possession of his faculties. That all appears affirmatively, but if that were not so, certainly there is no evidence to show that respondent had any reasonable ground to think otherwise. It is hardly reasonable, we must conclude, to suppose that such a man could witness, hour by hour, such results as were produced as he fed the planer, the accomplishment taking place in the narrow zone of three inches or so accompanied by rotary motion produced by understood attachments of the machine, by noise like unto that of a threshing machine cylinder, the trembling of the machine and forceful hurling of shavings over the pressure bar from the point where the board emerged—without knowing that in the narrow place there was a cutting mechanism working with great power. Is it clear then that the trial court was wrong in holding appellant's story to be unbelievable; that when he put his hand over and against the back side of the cutting cylinder—up to within a few inches of where he was accustomed, when standing in front of the machine as the end of a board disappeared under the chip breaker to hear the loud noise made by the cutting head followed immediately by shavings flying with force from out the very place where he put his hand—he did not know there was a cutting mechanism in that region with which his hand was liable to come in contact? It is considered that such question must be answered in favor of respondent.

Counsel for appellant took a wrong view of the case in supposing that the test of whether appellant's story is believable is whether any man under any circumstances could be reasonably held not to know of a cutting mechanism such as existed in this case, creating a danger zone in which his hand would be injured if placed there. Not so. The evidence must be considered from the viewpoint of respondent before the accident. There was nothing indicating that appellant was not in possession of all his faculties or not of full age and of ordinary common sense for one of his age. Is it reasonable to suppose that such a man under the circumstances in which appellant was placed, could, in the exercise of ordinary care, be ignorant of there being a danger zone in such a place as that where appellant reached with his hand, created by some cutting mechanism appropriate to produce the results witnessed to the boards as they passed through such zone? That is the question. We are constrained to the conclusion, there is no fair ground for overruling the decision of the trial court in respect thereto.

There are a number of other errors discussed in the briefs of counsel for appellant which need not be treated. If they were all resolved in appellant's favor it would not make any difference with the result. Therefore, we pass them with this brief notice.

Aside from a somewhat lengthy discussion of a few elementary principles which the writer at least thought might well be treated as they have been, though they are a part of the "a b c," so to speak, of our judicial system, we have given most attention to the question of whether the trial court was clearly wrong in deciding that appellant was guilty of contributory negligence as a matter of law. However, we find quite as much difficulty in concluding that there was clear error in holding, as matter of law, the evidence was insufficient to prove respondent was actionably negligent.

By the Court.—The judgment is affirmed.

The following opinion was filed April 1, 1911:

WINSLOW, C. J. (*concurring*). I agree that the trial judge was right in holding that under the evidence in this case the plaintiff was conclusively shown to have been guilty of contributory negligence. This conclusion necessitates affirmance of the judgment and renders it unnecessary to pass upon any other questions.

I wish to add a few words concerning one feature of the opinion. I agree entirely with the proposition that when there is a difference of opinion among the justices of this court on the question whether there is sufficient evidence in a given case to require submission of the case to a jury the opinion of the majority must prevail. If the minds of the majority are convinced that there is no evidence upon which a verdict could stand, they are in duty bound to say so, despite the fact that a minority of their brethren take the opposite view. This latter fact should certainly cause the majority to proceed with scrupulous care and examine and re-examine their premises and conclusions to see if they may not be wrong, but when that has been conscientiously done, if their minds are still convinced that their original conclusions are right, it is their bounden duty to say so and decide the case in accordance with their convictions. In no other way can they properly discharge their official duty. Each of them has taken an oath to discharge the duties of his office to the best of *his* ability, not to the best of some other person's ability. He is responsible to his own mind and conscience, and he must follow their dictates if he would be faithful to his great trust.

While I regard this principle as absolutely unassailable, I regard it as unfortunate in such a situation to use the expression that no reasonable mind can come to a different conclusion, or that different minds cannot reasonably come to different conclusions, or that there is no reasonable inference

which can be drawn the other way, or any equivalent expression. This is not a new idea with me. I expressed my dislike for the phrase under such circumstances in my dissenting opinion in the case of *Agen v. Metropolitan L. Ins. Co.* 105 Wis. 217, 80 N. W. 1020, and I have seen no reason to change the view there expressed.

The difficulty is that there is no infallible test or standard of what is reasonable and what is not reasonable. No two minds are alike. A conclusion which seems reasonable to one man may seem absolutely unreasonable to another, depending on differences in temperament, education, environment, and experience, yet both men may be men of high and unquestioned intellectual power. There is, of course, a very large domain where the conclusion from a given state of facts is so obvious that no sane mind could honestly reach any other. Under such circumstances it is correct to say that there is but one conclusion which is reasonable. But, on the other hand, there is a large domain of what may be called cases on or near the border line; cases where on the same facts two equally honest and able minds would disagree on the question whether there was any jury question in the case. Cases where there is a difference of opinion among the justices of this court as to the conclusion which may properly be drawn from the facts are in this latter domain, in my judgment. It is entirely proper and in fact necessary for the majority in such cases to decide the case upon their own judgment, but it is unfortunate, and it seems to me inaccurate, to say that no reasonable mind can think otherwise. It is sufficient and entirely accurate to say that the court (for the majority constitutes the court in case of division) is of opinion that there is no evidence which would warrant the submission of the case to the jury.

DENOYER, Respondent, vs. FIRST NATIONAL ACCIDENT COMPANY, Appellant.

February 21—March 14, 1911.

Accident insurance: False statement by applicant: Evidence: Change of occupation: Injury in prohibited occupation: Liability: Notice of prohibition: Amount of recovery.

1. Fraud must be proven with some degree of certainty and cannot be inferred or presumed from ambiguous evidence.
2. No false representation by an applicant for accident insurance in stating that he was by occupation a miller is shown by evidence that he was at the time operating a flour mill and that *at or about or after* that time he got a sawmill attachment and personally operated it.
3. Where an accident policy recognizes the right of the assured to change his occupation and liability of the insurer to compensate him in some amount for injury sustained in a more hazardous occupation, the assured may recover for injury sustained in an entirely prohibited occupation, where he had no notice, actual or constructive, of such prohibition; and the amount recoverable is that stipulated in the policy, if no agreement or stipulation for a less sum is shown.
4. A manual of instructions gotten up for the guidance of the agents of an unincorporated insurer, but not brought to the attention of the assured, is not competent evidence as against the assured to change the construction which his written policy would otherwise bear.

APPEAL from a judgment of the circuit court for Rock county: GEORGE GRIMM, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *Kelly & Manson,* and oral argument by *John T. Kelly.* They cited *Blumer v. Phœnix Ins. Co.* 45 Wis. 622; *Baumgart v. Modern Woodmen of America,* 85 Wis. 546, 55 N. W. 713; *Murphey v. Am. Mut. Acc. Asso.* 90 Wis. 206, 62 N. W. 1057; *Loehr v. Supreme Assembly E. F. U.* 132 Wis. 436, 112 N. W. 441; *Mowat v. Wilkinson,* 110 Wis. 176, 85 N. W. 661; *Lee v. C., St. P., M. & O. R. Co.* 101 Wis. 352, 77 N. W. 714; *Baxter v. Farmington,* 42 Wis. 425; and other cases.

For the respondent there was a brief by *Jeffris, Mouat,*

Smith & Avery, and oral argument by *L. A. Avery*. They cited, among other cases, *Weidner v. Standard L. & A. Ins. Co.* 130 Wis. 10, 110 N. W. 246; *French v. Fidelity & C. Co.* 135 Wis. 259, 115 N. W. 869; *Kircher v. Milwaukee M. Mut. Ins. Co.* 74 Wis. 470, 43 N. W. 487; *Lord v. Am. Mut. Acc. Asso.* 89 Wis. 19, 61 N. W. 293; *Lathers v. Mut. F. Ins. Co.* 135 Wis. 431, 116 N. W. 1; *Straker v. Phenix Ins. Co.* 101 Wis. 413, 77 N. W. 752; *Stevens v. Modern Woodmen of America,* 127 Wis. 606, 107 N. W. 8; *Schmidt v. Am. Mut. Acc. Asso.* 96 Wis. 304, 71 N. W. 601; *Fox v. Masons' F. Acc. Asso.* 96 Wis. 390, 71 N. W. 363; *Comstock v. Fraternal Acc. Asso.* 116 Wis. 382, 93 N. W. 22; *John O'Brien L. Co. v. Wilkinson,* 123 Wis. 272, 101 N. W. 1050; *Hewitt v. John Week L. Co.* 77 Wis. 548, 46 N. W. 822; *Cannon v. Home Ins. Co.* 53 Wis. 585, 11 N. W. 11; *Best v. Sinz,* 73 Wis. 243, 41 N. W. 169; *Hall v. Am. M. Acc. Asso.* 86 Wis. 518, 57 N. W. 366; *Adams v. Rodman,* 102 Wis. 456, 78 N. W. 588, 759; *Goldman v. Fidelity & D. Co.* 125 Wis. 390, 104 N. W. 80; *Newton v. Theresa Village Mut. F. Ins. Co.* 125 Wis. 289, 104 N. W. 107; *Maxon v. Gates,* 136 Wis. 270, 116 N. W. 758; *Ferguson v. Truax,* 136 Wis. 637, 118 N. W. 251.

TIMLIN, J. There was a recovery of $480 on a policy of accident insurance whereby the appellant insured the respondent in the sum of $40 per month against nonfatal accidental injuries which solely and independently of all other causes should immediately and totally disable the insured and prevent him from attending to any of the duties pertaining to his occupation for a period of continued disability not to exceed fifty-two consecutive weeks for any one injury. Conditions incorporated into the policy by express reference were the following:

"Fraud, misstatement or concealment of any fact in the application for this insurance, or for any claim made under this policy, shall render this contract void."

"If the insured shall be injured while exposed to hazard greater than his occupation as classed by the company, its liability shall be only for such amount as is provided for the more hazardous class."

No other conditions or forfeitures are provided. One defense was that in his application for this policy the respondent stated that he was by occupation a miller, but fraudulently misstated and concealed the fact that he owned and operated a sawmill equipped with a circular saw for cutting logs into lumber and personally operated said saw and the cutting of logs therewith, and while so doing received the injury in question. Another, that operating a circular saw was an occupation classed by the defendant as a prohibited risk and persons engaged therein were not insurable by the defendant.

The evidence was that at the time of making the application *Denoyer* was operating a flour mill and got his sawmill attachment at or about or after that time. He therefore made no false representations. Fraud must be proven with some degree of certainty and cannot be inferred or presumed from ambiguous evidence. There is nothing in the policy which avoids the policy after its issue merely because the assured changed his occupation, and there is no covenant or condition therein that he shall continue in the occupation in which he was engaged at the time the policy issued. On the contrary, the policy itself recognizes the right of the assured to make some change, with the effect only of decreasing his indemnity.

There is a clear recognition of the liability of the company to respond in damages for loss of time resulting from injuries sustained by the assured while acting outside of the given occupation. The appellant meets this by saying that the occupation of operating a circular saw was not merely one of greater hazard but an entirely prohibited risk. This defense is unavailable, because this covenant or condition does not appear in the application, policy, or any other paper to have

been brought to the attention of the assured. The book of instructions to agents which it is claimed classifies risks and prohibits insurance on one engaged in operating a circular saw is not made a part of the bill of exceptions, and there is no competent evidence before us to show that there is any such regulation. The defendant is not a corporation; has no by-laws. The instructions to agents or the manual is a book gotten up by the president of the unincorporated defendant for the guidance of his solicitors and agents, and is not competent evidence as against the plaintiff to change or modify the construction which his written contract would otherwise bear. The defense of fraud having failed for lack of evidence, and the fair construction of the written contract being that if one steps aside from his given occupation and is injured he may nevertheless recover something, the plaintiff is entitled to recover. The burden was on the defendant to establish a forfeiture or an exception which would take the case out of the broad covenant for liability first found in the policy. *Cronkhite v. Travelers Ins. Co.* 75 Wis. 116, 43 N. W. 731, 40 L. R. A. 448, note.

In order to reduce this recovery the defendant must show by some stipulation or agreement that plaintiff was entitled to a less sum than that awarded by the jury. The evidence is silent on this subject.

By the Court.—Judgment affirmed.

KOPPLIN, Respondent, vs. QUADE, Appellant.

February 21—March 14, 1911.

Appeal: Review: Exceptions: Trespass by bull: Measure of damages: Remoteness.

1. Exceptions to rulings of the trial court admitting evidence are not available on appeal if no exception was taken to the refusal to grant a new trial.
2. The ruling denying a motion for directed verdict, if excepted to, may be reviewed on appeal, although no motion for a new trial was made or although a refusal to grant a new trial was not excepted to.
3. Where, as the result of a trespass by defendant's common bull, plaintiff's thoroughbred heifer was delivered of a calf begotten by said bull, the measure of damages was the difference in the value of the heifer to plaintiff before and after the trespass, in view of the uses which he intended to make of her.
4. It appearing that plaintiff was keeping the heifer for breeding purposes and intended to breed her to his registered thoroughbred bull, one element of the damages was the difference between the value of the calf dropped and the value of a calf from the heifer if bred to plaintiff's bull; and evidence of such difference was not objectionable on the ground of remoteness.

APPEAL from a judgment of the county court of Jefferson county: CHARLES B. ROGERS, Judge. *Affirmed.*

R. W. Lueck, for the appellant.

For the respondent there was a brief by *Skinner & Thauer,* and oral argument by *Nicholas Thauer.*

BARNES, J. On September 14, 1907, the plaintiff was the owner of a thoroughbred Holstein-Friesian heifer which was born on January 8, 1906, and had been thereafter duly christened "Martha Pietertje Pauline." The name is neither euphonious nor musical, but there isn't much in a name anyway. Shakespeare (W.), *Romeo and Juliet,* act II, scene 2. Notwithstanding any handicap she may have had in the way of a cognomen, Martha Pietertje Pauline was a genuine

"highbrow," having a pedigree as long and at least as well authenticated as that of the ordinary scion of effete European nobility who breaks into this land of democracy and equality and offers his title to the highest bidder at the matrimonial bargain counter. The defendant was the owner of a bull about one year old, lowly born and nameless as far as the record discloses. This plebeian, having aspirations beyond his humble station in life, wandered beyond the confines of his own pastures and sought the society of the adolescent and unsophisticated Martha, contrary to the provisions of sec. 1482, Stats. (1898), as amended by ch. 14, Laws of 1903. As a result of this somewhat morganatic *mésalliance* a calf was born July 5, 1908. Plaintiff brought this action to recover resulting damages and secured a verdict for $75, upon which judgment was entered, and defendant appeals therefrom.

The case was apparently tried without any clear conception of what the appropriate rule of damages applicable to such an unusual situation was. The charge of the court on the subject was not illuminating or helpful to the jury, but no exception was taken thereto. The defendant requested an instruction which was not accurate, and no exception was taken to the refusal of the court to give it. Certain testimony tending to show damages of doubtful legitimacy was objected to, and exception was taken to the rulings of the court admitting it, but no exception was taken to the order of the trial court refusing to grant a new trial. So the questions which this court can review are very limited. At the close of the testimony the defendant moved for a directed verdict and excepted to the ruling of the court denying such motion. The correctness of this ruling can be reviewed without any motion for a new trial having been made. So as to this question it is immaterial whether the order denying the new trial was excepted to or not. *Beebe v. M., St. P. & S. S. M. R. Co.* 137 Wis. 269, 118 N. W. 808, and cases cited.

If on the evidence before the court the plaintiff was en-

titled to recover any amount, then the court properly denied the motion. The plaintiff offered testimony tending to show that he kept and intended to keep Martha for breeding purposes and for the milk which she might produce, and not for sale. It also showed that plaintiff was the owner of a blue-blooded bull of the "Holstein-Friesian" variety, to which he intended to breed Martha some three months later than the date of the unfortunate occurrence related. There was evidence tending to show that a thoroughbred calf would be worth all the way from $22.50 to $150, depending on its sex, markings, and other characteristics. Its sinister birth disqualified the hybrid calf born from becoming a candidate for pink ribbons at county fairs, and it was sold to a Chicago butcher for $7 and was probably served up as pressed chicken to the epicures in some Chicago boarding house.

Numerous witnesses testified that a thoroughbred calf had a much greater value than a grade calf, and this evidence is not contradicted in any way. True, the witnesses vary widely as to the amount of such difference in value, but the matter of arriving at an exact amount of compensation in most tort actions is involved in uncertainty and difficulty, and it was for the jury to say on all the testimony what sum would reasonably compensate the plaintiff. This element of damages was direct and proximate and the objection to it on the ground of remoteness is not well taken.

The true measure of damages was the difference between the value of the heifer to the plaintiff before and after the trespass, in view of the uses which the plaintiff intended to make of the heifer. Such a rule furnishes compensation, and this is what the law aims at. There was no direct question asked of any witness as to what such difference would be, but the line of examination pursued elicited at least some if not all of the items or elements of damages that a witness would consider in answering such a question if it were asked. One of those elements would be the difference between the

value of the calf dropped and the value of a calf from the heifer if bred to a registered Holstein-Friesian bull. It is apparent, therefore, that there was some competent evidence before the jury from which it might properly return a verdict for substantial damages, and that therefore the motion to direct a verdict was properly denied. Indeed, this result might well follow if the plaintiff were entitled to recover nominal damages only.

By the Court.—Judgment affirmed.

HANRAHAN and another, Respondents, vs. CITY OF JANESVILLE, Appellant.

February 21—March 14, 1911.

Municipal corporations: Contracts for sewers: Assignment: Who may maintain action: Authority of officers: Plans and specifications: What bidders may rely upon: Computation of amount of work: Right to extra compensation.

1. Where, with the consent of the city, contracts for the construction of sewers were sublet and the subcontractors fully performed the work thereunder, an assignment of the contracts by the original contractor to the subcontractors was valid and entitled the assignees to maintain an action for extra work done under the contracts, even though the city did not know of or consent to such assignment.
2. In dealing with a public corporation a contractor is bound to know the extent of the authority of its officers as well as of the corporation itself.
3. In bidding upon sewer work in a city governed by the general charter law, contractors are to be guided by the plans and specifications prepared and filed pursuant to sec. 925—214, Stats. (1898), and have no right to rely upon a "bidding sheet" containing computations of the amount of excavation and other work to be done, though prepared and furnished to them by the city engineer; and where such plans and specifications are cor-

rect, and especially where the contract in terms provides that the work shall be done in accordance therewith, the contractor cannot recover extra compensation for work required thereby, even though it is in excess of the amount shown by such bidding sheet.

4. The statute has placed the burden of computing the amount of work in such a case upon the bidders and not upon the city; and the courts are not bound to accept as true the testimony of witnesses to the effect that bidders could not compute the amount of excavation from plans which included profiles carefully drawn to scale, showing the existing surface of the street and the bottom line of the sewer.

APPEAL from a judgment of the circuit court for Rock county: GEORGE GRIMM, Circuit Judge. *Reversed.*

Action to recover compensation for extra services alleged to have been necessarily performed by the plaintiffs for the defendant under contracts entered into between the parties for the construction of sewers. On July 7, 1904, the defendant published a written notice to contractors that it would receive bids and sealed proposals for furnishing materials for the construction and completion of sewers upon certain streets named therein. One M. J. Benson made an offer to furnish the materials and do the work necessary for the construction of such sewers upon said streets according to the specifications, profiles, plans, and details on file in the office of the city clerk, and on or about the 8th day of August, 1904, the defendant accepted the proposal of said Benson to furnish the materials and construct said sewers, and the parties entered into contracts for their construction. After the commencement of the work of constructing said sewers, said Benson, with the knowledge and consent of the defendant, sublet the work to the plaintiffs and they completed the contracts. The complaint alleged:

"That the specifications, plans, details and profiles for the construction of said work under said several contracts furnished by said defendant and its officers, were and are false,

imperfect, misleading and inaccurate in many parts and particulars, and by reason of such falsity, inaccuracy and incompleteness these plaintiffs were put to great expense and damage and loss of time and money in carrying out their said contracts, which was not within the contemplation of either party at the time of making said contracts, and which could not be foreseen by plaintiffs or by said Benson in entering into the same; and all of which labor and expense was in excess of the labor and expense it would have taken to have carried out said contracts had there been no such falsity, inaccuracy and incompleteness in said specifications, plans, bidding sheet, details and profiles of said work.

"That for the purpose of the information of bidders on the proposed work in the several districts hereinbefore mentioned, and for the guidance and information of said Benson and these plaintiffs in entering into said contracts with the said defendant, the said defendant submitted plans and profiles, details and bidding sheet of the proposed work in the several districts; that said plans and profiles, details and bidding sheet were expressly made a part of said several contracts; that such plans and profiles, details and bidding sheet were represented to the said Benson and to these plaintiffs as showing the surface grade of the several streets upon which such sewerage system was to be constructed and as showing the average cut or depth of trench necessary for the several sewers.

"That said profiles, details and bidding sheets represented and were held out to these plaintiffs and to said Benson as being a correct representation and statement of the depth and amount of excavation that would be necessary to be made upon each of the streets upon which such sewerage system was to be constructed, and every portion thereof, and that upon such representations these plaintiffs and said Benson relied as furnishing the information upon which they could and did figure the exact amount of excavation necessary under said several contracts, and it was so intended by said defendant that such plans and profiles, details and bidding sheets should be used for that purpose; that the said Benson and these plaintiffs relied upon and believed said plans and profiles, details and bidding sheets to be true and correct rep-

resentations and statements of the grade of the several streets and the depth to which such sewer should be laid and the excavations necessary therefor.

"That such profiles and plans, details and bidding sheets were and are defective, false and untrue, in that the said profiles and plans do not show the grade or surface of the street at all and are incorrect, defective and false in that respect and the average cut and depth of excavation is incorrectly stated in the bidding sheets and details; and that the said profiles and plans are so drawn and said bidding sheets are so prepared as to indicate that the amount of excavation necessary for the construction of such sewer is much less than the actual amount of excavation necessary to lay said sewer according to the contracts.

"That by reason of such defective and false plans and profiles, details and bidding sheets these plaintiffs were obliged to and did carry on excavations for all of said sewerage system under all of said contracts to a much greater actual depth than shown by said plans and profiles, to a large expense and cost to these plaintiffs over and above and in excess of what it would have cost to have made the excavations in accordance with the plans and profiles, in the sum of $5,555.70, no part of which has ever been paid, and that the said sum is now justly due and owing to plaintiffs."

The answer denied the charge of inaccuracy of the plans, profiles, specifications, and details, pleaded payment in full for all and every liability growing out of the building and construction of said sewers, and that it never had any contracts with the plaintiffs or either of them.

The action was tried without a jury. The court made findings covering many questions that do not arise on this appeal, and entered judgment in favor of plaintiffs for extra services in the sum of $2,079.72 with interest thereon from November 27, 1905. From such judgment the defendant appealed.

For the appellant there was a brief signed by *H. L. Maxfield,* city attorney, and *F. C. Burpee,* of counsel, and oral argument by *Mr. Burpee.* They contended, *inter alia,* that

the contract was nonassignable without the city's consent. *Burck v. Taylor,* 152 U. S. 634; *Omaha v. Standard Oil Co.* 55 Neb. 337; *Murphy v. Plattsmouth,* 78 Neb. 163; *Deffenbaugh v. Foster,* 40 Ind. 382; *Skobis v. Ferge,* 102 Wis. 122; *Johnson v. Vickers,* 139 Wis. 145. The statute determines the rights of the parties, and the estimates did not enter into the contract. *Chippewa B. Co. v. Durand,* 122 Wis. 85; *Ricketson v. Milwaukee,* 105 Wis. 591; *Kavanaugh v. Wausau,* 120 Wis. 611; *Burnham v. Milwaukee,* 100 Wis. 55; *Lee v. Racine,* 64 Wis. 231; *Appleton W. W. Co. v. Appleton,* 132 Wis. 563; *Rief v. Continental C. Co.* 131 Wis. 368; *More v. Milwaukee M. Co.* 126 Wis. 41.

For the respondents there were briefs by *Jeffris, Mouat, Smith & Avery,* and oral argument by *William Smith.* To the point that the city was responsible for the erroneous estimates, they cited *Bentley v. State,* 73 Wis. 416; *Burnham v. Milwaukee,* 100 Wis. 55; 30 Am. & Eng. Ency. of Law (2d ed.) 1202; *Slusser v. Burlington,* 47 Iowa, 300; *Wood v. Fort Wayne,* 119 U. S. 312; *Robinson v. Rohr,* 73 Wis. 436; *Damkoehler v. Milwaukee,* 124 Wis. 144, 149; *Bunker v. Hudson,* 122 Wis. 43; 1 Dillon, Mun. Corp. § 237; and other cases.

VINJE, J. The first question raised by the defendant is that there was no assignment of the contracts from Benson, the principal contractor, to the plaintiffs, that was binding upon the defendant, owing to the fact that it never knew of, or consented to, such assignment. The trial court, however, found that it did, and we are strongly urged to set aside such finding as not supported by the evidence. We deem it unnecessary to determine the precise question raised, because the city is not seeking, by counterclaim or otherwise, to enforce any liability against the principal contractor or the plaintiffs, but only attempting, by defensive matter, to escape the liability sought to be enforced against it. All the work re-

quired to be done under the contracts was done by the plaintiffs with the knowledge and consent of the defendant. For it is admitted that Benson sublet the work to the plaintiffs; that the defendant consented in writing thereto; and that all the work called for by the contracts has been fully performed. That being so, it is not perceived how the defendant is prejudiced by an assignment to the plaintiffs of whatever claim there may be under the contracts by the rightful owner of such claim. Confessedly such owner was either Benson or the plaintiffs. Benson having assigned to the plaintiffs, the defendant is amply protected by such assignment from further suits by him. *Hankwitz v. Barrett,* 143 Wis. 639, 128 N. W. 430. And defendant was in position to interpose any defense against the plaintiffs that would have availed against Benson. So we must conclude that the assignment was valid and that plaintiffs were entitled to maintain the action.

The more important question is whether or not plaintiffs necessarily did more work than their contracts called for. The solution of this question will depend upon whether or not the plaintiffs were entitled to rely upon a so-called "bidding sheet" or estimate of cuts, hereinafter mentioned. The incorrectness of this sheet was admitted. It appears that the defendant city, as to sewers, is operating under the general charter law found in secs. 925—208 to 925—239*c*, Stats. Such law provides in secs. 925—208 to 925—212 that the city shall be divided into sewerage districts and a plan shall be adopted; that diagrams of the plans of the sewerage for each district shall be prepared, showing the lots and parcels of land, the main sewers, minor sewers, manholes, catchbasins, and all other matters pertaining to the system. It further provides for notice to be published of the proposed plan, of a hearing of objections, and a report thereon to the common council. The latter "shall then examine the same and may approve the plan as proposed or change it in such manner as they think proper, and approve as changed or

modified by them, or may reject the plan and direct the board to propose a new plan, in which case proceedings shall be had as before." Sec. 925—211. The next section provides that "when the plan for any sewerage district is finally determined complete diagrams of the same shall be prepared in duplicate and certified to be correct by the board of public works; one of such diagrams shall be filed in the office of the city clerk and one in the office of the register of deeds of the county within which the city is located." It is also made obligatory on the board of public works to present to the council on or before the first Monday of March in each year a report "of the sewers necessary or advisable to be constructed during the ensuing year." This report the council may approve as made or as changed or modified by it. Sec. 925—213. The provisions of sec. 925—214 are that:

"After the council shall have ordered the construction of any sewer the board of public works shall advertise for and receive bids to do the work so ordered, having first procured to be carefully prepared and put on file in the office of the board, for the examination and guidance of bidders, plans and specifications describing the work to be done and the kinds and qualities of materials to be used, as directed by the council, and shall let the contract to the lowest responsible and reliable bidder; provided, however, that the board shall have the right to reject all bids and re-advertise for proposals if they believe none of the bidders are responsible or that any agreement has been entered into between bidders to prevent competition; and provided further, that the contract shall not be binding till approved by the council and countersigned by the comptroller."

It is apparent from this scheme that every step in the progress of the construction of sewers, from the first proposed plan until the approval of the contract by the city comptroller, is a matter of record, and is a matter upon which the city as such acts. Sec. 925—214 prescribes precisely what the board of public works shall cause to be prepared and put on file for the examination and guidance of bidders, namely,

plans and specifications describing the work to be done and the kinds and qualities of material to be used, *as directed by the council.* The rule *Expressio unius est exclusio alterius* certainly applies here. In express terms the statute says what bidders shall examine and be guided by, namely, the plans, specifications, etc., prepared by the city pursuant to law and put on file for that express purpose. No mention or hint of any bidding sheet or estimate of cuts prepared by the city engineer or any one else is made. Indeed, the very contract entered into between the parties excludes the idea of any such sheet having been the basis thereof or even the inducement therefor. It says:

"Whereas, The said party of the first part hath made to the city of *Janesville* a proposal in writing, which is hereto annexed, marked 'Exhibit A,' to furnish all the material and do all the work for the construction and completion of certain sewers mentioned in said proposal, according to the specifications therefor, hereto annexed, marked 'Exhibit B,' and the profiles, plans and details thereof on file in the office of the street assessment committee, in the city clerk's office in said city; and the contract for doing said work has been awarded to the said party of the first part in the manner provided by law:

"Now, therefore, the said party of the first part, hereinafter designated 'the contractor,' for and in consideration of the covenants and agreements hereinafter contained, hereby covenants and agrees to and with the city of *Janesville* to furnish all the material and do all the work necessary and required for the construction and completion of the sewers in the streets, parts of streets, alleys, public grounds and lots mentioned in said proposal, and to prosecute the same diligently to their full completion, in accordance with and pursuant to the specifications therefor, and the profiles, plans and details thereof, and subject to the superintendence and direction of the street assessment committee, as in said specifications and this contract set forth. And said proposal, specifications, profiles and plans respectively, are hereby made a part of this contract, and mutually binding and obligatory in all respects to the same purpose and effect as if incorporated in this con-

tract; and all the requirements thereof respectively are agreed upon as of the terms of this contract, and as well of the character and quality of the material to be used and the manner of the construction of the said sewers therein specified and set forth, and the price to be paid for the construction and completion of said sewers."

This sets forth clearly that the plaintiffs agreed to furnish the material and do the work in accordance with and pursuant to the specifications, profiles, plans, and details on file in the city clerk's office, which were by the terms of the contract incorporated therein and made a part thereof. When we come, therefore, to inquire what the plaintiffs agreed to do, we find it clearly set out in the contract itself. They agreed to do the work, not as per bidding sheet, but as per plans and specifications incorporated into the contract. The bidding sheet was a mere fugitive piece of paper entitled "Sewer Estimate of Cuts in Janesville, Wis." It was found by the trial court to have been given by the city engineer to the contractor, Benson, when he came to figure on the contract. The city engineer stoutly denied that he gave it to Benson and says it was prepared by his assistant at the request of certain other contractors, and that in the preparation of it his assistant did the work for the contractors and not for the city. Benson said, speaking of the bidding sheet: "I got the blue prints to figure on, at the same time he [the city engineer] gave me this to expedite and help me in the matter." We will assume, however, that the fact is as found by the trial court, that it was given to Benson by the city engineer. Did the contractor have a right to rely upon it? The sheet consists of a computation as to each street showing minimum cut; maximum cut; average cut; distance of average cut; distance of cut over eight feet; and sizes of pipes. It is evident, therefore, that it is neither a plan, profile, specification, nor a detail, but a computation made from the profiles and specifications. It was not contemplated, called for, or mentioned either in the statute or the contract. In dealing with

a public corporation as the contractor did, he was bound to know the extent of the authority of its officers as well as of the corporation itself. "It is a general and fundamental principle of law," says Dillon in his work on Municipal Corporations, sec. 447 (4th ed.), "that *all* persons contracting with a municipal corporation must *at their peril inquire into the power* of the corporation or of its officers to make the contract; and a contract beyond the scope of the corporate power is void, although it be under the seal of the corporation. . . . So, also, those *dealing with the agent of a municipal corporation* are likewise bound to ascertain the nature and extent of his authority. This is certainly so in all cases where this authority is special and of record, or conferred by statute. The fact that in such a case the agent made false representations in relation to his authority and what he had already done, will not aid those who trusted to such representations, to establish a liability on the part of his corporate principal." He was therefore chargeable with knowledge of the fact that the city engineer had no authority to change the depth of the excavations as shown by the profiles. The statute prescribed the mode of letting the contract and the basis upon which it was to be let, and that mode was exclusive and binding upon both the city and the contractor. He cannot now be heard to say that he relied upon something which he knew he had no right to rely upon. For every person dealing with an officer of a public corporation is presumed to know the extent of his powers in the particular case. *Gilbert v. Pier,* 102 Wis. 334, 78 N. W. 566.

But it is claimed that laymen and contractors could not determine the depth of cut from the profiles and therefore recourse to the bidding sheet was necessary. It is rather regretfully that we mention this claim, for it can hardly be disposed of without the use of language that may offend. The profiles were carefully drawn to scale with the horizontal and vertical scale plainly marked thereon, and showed the existing

surface of the street in each case, and the base or bottom line of the sewer as to each street, yet in spite of this fact several witnesses testified that the contractors could not compute the amount of excavation therefrom. Such testimony challenges either the credibility or the intelligence of the witness, or both. The witness *Lindquist* emphasized this challenge by first testifying that it was not practicable to figure from the profiles, and then by saying that as the work progressed he frequently scaled the profiles to check up and to ascertain how deep their work was; and that he used the profiles in the progress of the work. Benson had been in the sewer contracting business for ten years and *Lindquist* for fifteen years. They were neither laymen nor tyros. It would seem as though it were high time they understood profiles. So much by way of a gentle reminder to witnesses that courts are not bound to accept as true all testimony that is given.

We have stated that the profiles showed the existing surface of the street in each case. This is true, though such fact did not appear from those profiles on which only the established grade of the street was marked. The established grade of each street, however, was a matter of public record, and the survey made by plaintiffs' witness Clausen, which was a surface survey of every street in question, shows that the established grades corresponded to the actual surface or else there would not have been a practical correspondence between Mr. Clausen's survey and the profiles. That there was such a correspondence is shown by Mr. Clausen's testimony and is not disputed. The contractors, by the profiles, plans, specifications, and details, were furnished correct data upon which to base their bid. That a correct so-called estimate of cuts or bidding sheet would have saved them considerable work in computation is self-evident. But the statute has seen fit to place the burden of computation upon the contractors and not upon the city, and there we must let it rest.

As no claim is made that more work was done or material

furnished than was called for by the profiles, plans, specifications, and details, and as these were all admitted upon the trial to be correct, it follows that plaintiffs' claim should have been disallowed in full. This disposition of the case renders it unnecessary to consider a number of questions discussed in the brief and upon the oral argument.

By the Court.—Judgment reversed, and cause remanded with directions to dismiss the complaint upon the merits.

SCHMIDT, Respondent, vs. MERTES, Appellant.

February 21—March 14, 1911.

Partnership: Dissolution: Accounting and settlement: Action: At law or in equity?

1. Where partnership affairs have been settled by agreement and nothing remains to be done except payment of the amount which one partner has agreed to pay the other for his share in the business, the remedy at law for failure to pay such agreed sum is adequate and exclusive, at least unless defendant is insolvent.
2. But where the agreement to dissolve is contingent upon an accounting and settlement which the parties are unable to complete because of divergent views as to their respective interests, and, although defendant has been placed in possession of the firm assets, it appears that such possession was surrendered to him upon his promise that the settlement should be made, and it further appears that there are firm liabilities still unpaid and that defendant has attempted to mortgage the partnership property as his own, an action in equity for an accounting and settlement will lie.

APPEAL from an order of the circuit court for Washington county: MARTIN L. LUECK, Circuit Judge. *Affirmed.*

This is an action in equity to wind up a partnership, and from an order overruling a general demurrer to the complaint the defendant appeals. The complaint alleges in substance

that the parties formed a partnership in May, 1907, for the purpose of conducting the retail drug business at Hartford in this state, the plaintiff contributing his experience as a practical druggist and the defendant $2,500 in cash, the plaintiff agreeing to pay defendant $25 per month until the amount paid should equal one half of defendant's cash contribution; that the partnership business was opened in July, 1907, and continued in operation till August, 1909, during which time the plaintiff paid to the defendant $400 on the agreement last referred to; that just prior to August, 1909, a dispute arose between the partners, and it was then agreed that the partnership should be dissolved, that an inventory of all of the assets be taken "and the books of said partnership be examined, and that a complete accounting should be had for the purpose of ascertaining the interest of each partner in said business; that after such accounting the defendant should pay to the plaintiff what his interest in said business amounted to, and that thereupon the defendant should become sole proprietor of said business." The complaint further alleges that the plaintiff, relying on defendant's promise to make a fair settlement of the partnership affairs, gave up possession of the partnership assets to the defendant, who still retains such possession; that an inventory of assets was taken, the books and accounts examined and settled, a list of partnership liabilities agreed on, the amounts respectively drawn out by the partners agreed on, and it was found that the net assets, excluding book accounts of about $600, were $2,776.61; that after these matters had been agreed on a dispute arose between the parties as to their respective interests in the assets, and that the parties are still unable to agree thereon; that defendant is in possession of all the partnership assets, and is conducting the business, receiving the full benefit of the good will, and wrongfully claims to own all of the assets and has attempted to mortgage the same; that he has wrongfully excluded the plaintiff from participation in the

business and from possession of the assets, although plaintiff has demanded that he be allowed to participate in the management, control, and possession of the property. The prayer is for dissolution of the partnership, appointment of a receiver with power to dispose of the property, payment of the partnership debts and costs, and division of the remaining assets between the parties according to their respective interests.

The cause was submitted for the appellant on the brief of *Sawyer & Sawyer,* and for the respondent on that of *Paul A. Rix.*

WINSLOW, C. J. The appellant does not dispute the general principle that equity is the proper forum in which to close up partnership concerns, settle the accounts between the partners, dispose of the property, and pay the partnership debts through the arm of a receiver, and divide the residuum between the partners; but his contention is in substance that under the allegations of the present complaint it appears that the partnership affairs have been settled by agreement of the parties, and that nothing remains save the payment of the amount which the defendant has agreed to pay the plaintiff for his share in the business. Were his premises correct it seems that the conclusion would follow that the remedy at law by action to recover the agreed balance would be adequate and exclusive. Where nothing is left to be done save the payment of an agreed balance there can be no necessity of a resort to equity, at least in the absence of insolvency on the part of the defendant. *Edwards v. Remington,* 51 Wis. 336, 8 N. W. 193; *Gauger v. Pautz,* 45 Wis. 449.

That, however, is not the situation presented by the complaint. True, the parties agreed to dissolve, and have agreed upon an inventory of assets and upon the amounts they have respectively drawn from the business, but here they part company. They cannot agree as to their respective interests in

the residuum of assets. Now the agreement of dissolution as alleged in the complaint was in substance that after the accounting the interest of each partner should be ascertained and the defendant should pay to the plaintiff what his interest amounted to (*i. e.* the interest thus ascertained), and *thereupon* the defendant should become sole proprietor of the business and the plaintiff should step out. There was to be no dissolution nor relinquishment of plaintiff's rights as a partner until this payment. True, the defendant took possession of the property with plaintiff's consent, but only upon the promise that the settlement should be made. So we have a case of an agreement to dissolve in the future contingent upon an accounting and settlement which the parties are unable to complete on account of divergent views as to their respective interests, and, while the defendant has been placed in possession of the firm assets, it appears that the possession was surrendered upon the promise that the settlement should be made. In addition to this, it fairly appears from the complaint by inference that there are firm liabilities still unpaid and that the defendant has attempted to mortgage the partnership property as his own.

All these considerations differentiate the case very materially from a case where all that remains to be done is for one partner to pay the other an agreed balance. We conclude that the demurrer to the complaint was properly overruled.

By the Court.—Order affirmed.

LITTS and another, Respondents, vs. MORSE, Appellant.

February 21—March 14, 1911.

Real-estate brokers: Middlemen: Commissions from both parties.

Brokers who, in procuring a purchaser for land, acted as middlemen only and not as agents of the vendor, are entitled to the agreed commission for such service, even though they were also employed by and received a commission from the purchaser.

APPEAL from a judgment of the circuit court for Waukesha county: MARTIN L. LUECK, Circuit Judge. *Affirmed.*

Plaintiffs allege that in the fall of 1906 they entered into an agreement with the defendant whereby the defendant agreed to pay to the plaintiffs the sum of $500 commission in the event of their securing a purchaser at a stated price for defendant's hotel property in the city of Elkhorn. The complaint also alleges that the defendant agreed to take in exchange for such property improved or unimproved Western lands; that thereafter plaintiffs secured the Burchard-Hurlbut Land Company as a purchaser, brought the parties together, and a sale resulted. The answer of the defendant was a general denial of the allegations of the complaint. On the trial defendant asked permission to amend his answer so as to set up as a defense the fact that plaintiffs were in the employment of the party who purchased defendant's property and received a commission from such purchaser, and that the plaintiffs acted for the purchaser adversely to the interests of the defendant. The court refused to permit such amendment. Testimony was introduced, however, tending to prove defendant's contention in this regard. Upon a verdict for the plaintiffs for $500 and costs judgment was entered, from which judgment this appeal is taken.

E. T. Cass, for the appellant.

J. J. Cunningham, for the respondents.

BARNES, J. The defendant contends (1) that the verdict rendered is not supported by the evidence, and (2) that the plaintiffs cannot recover because they acted as the agents of both parties to the transaction.

1. The plaintiff *Francis* testified to the making of the contract, the substance of which is contained in the statement of facts. The defendant denied that such contract was made. On this disputed testimony the jury found for the plaintiffs and its verdict is conclusive in this court.

2. The evidence quite clearly shows that the plaintiffs acted in the capacity of middlemen and not as agents of the defendant. Such being the situation, they were entitled to recover the commission agreed upon. *Tasse v. Kindt, ante,* p. 115, 128 N. W. 972, and cases cited.

By the Court.—Judgment affirmed.

JANSEN, Respondent, vs. KUENZIE, imp., Appellant.

February 21—March 14, 1911.

Bills and notes: Additional signatures after maturity: Consideration: Statute of frauds.

One who, after maturity of a note executed by another person and in consideration of the extension of the time for payment, signs the same as maker, thereby adopts the terms of the note and becomes bound by it,—the recital in the note, "for value received," being a sufficient compliance with the statute of frauds (sec. 2307, Stats. 1898) as to expressing the consideration.

APPEAL from a judgment of the circuit court for Dodge county: MARTIN L. LUECK, Circuit Judge. *Affirmed.*

This action was brought against *G. M. Kuenzie,* appellant, and Louis N. Meyer and Xavier Maier, defendants, upon a promissory note for $300 made and executed by the defendant Louis N. Meyer on the 30th day of December, 1900, pay-

able one year after date with six per cent. interest. The interest was paid and indorsed upon the note until December 9, 1905, at which latter date plaintiff pressed for payment and the defendant Louis N. Meyer asked for an extension of one year, which plaintiff promised to give provided said Louis N. Meyer would obtain additional signers. Xavier Maier and appellant signed the note under the name of the original maker, Louis N. Meyer, and at his request. After the expiration of the year from the time of the signing by the appellant and Xavier Maier this suit was brought against the three signers, Louis N. Meyer, Xavier Maier, and the appellant, *G. M. Kuenzie*. *Kuenzie* appeared and defended on the ground that there was no consideration for his signature and that no new consideration in fact passed at the time of signing the note. The case was tried by the court without a jury and the following findings made:

"(1) That on the 30th day of December, 1900, at Waupun, Wisconsin, the defendant Louis N. Meyer made his promissory note in writing dated on that day, and thereby promised to pay to the plaintiff the sum of three hundred ($300) dollars one year after date, with interest at the rate of six per cent. per annum until paid.

"(2) That during the month of December, 1905, the defendants Xavier Maier and *G. M. Kuenzie* signed the promissory note executed by Louis N. Meyer and bearing date on the 30th day of December, 1900, and thereby promised to pay to the plaintiff the sum of three hundred ($300) dollars, according to the terms of said note.

"(3) That no part of said note has been paid, except the payments of interest, as appears from the indorsements on the back of said note."

And as conclusions of law the court found:

"(1) That the defendants, Louis N. Meyer, Xavier Maier, and *G. M. Kuenzie,* are indebted to the plaintiff on said note for the sum of three hundred ($300) dollars, together with the unpaid interest due on same."

Judgment was rendered for the plaintiff in accordance with the findings in the sum of $300, together with interest and costs, from which judgment this appeal was taken.

For the appellant there was a brief by *Skinner & Thauer,* and oral argument by *Nicholas Thauer.*

James Murray, for the respondent.

KERWIN, J. It is insisted on the part of the appellant that his signature to the note in question was not binding upon him, but was void under the provisions of sec. 2307, Stats. (1898), because it was a special promise to answer for the debt, default, or miscarriage of another, not in writing expressing the consideration and subscribed by the party to be charged therewith. It is argued that, the note being a valid obligation when originally made and signed by Louis N. Meyer, it could not afterwards by the signature of the appellant become his contract and binding upon him. We do not think the position is well taken. The note upon its face recited that it was given for value received and was in compliance with all the provisions of the statute, which require the agreement to pay the debt of another to be in writing expressing the consideration and signed by the party to be charged. The consideration "for value received" was recited in this note, and that is a sufficient compliance with the statute as to expressing consideration. *Day v. Elmore,* 4 Wis. 190; *Sears v. Loy,* 19 Wis. 96; *Houghton v. Ely,* 26 Wis. 181, 189; *Dahlman v. Hammel,* 45 Wis. 466; *Young v. Brown,* 53 Wis. 333, 10 N. W. 394.

The signature of the appellant to this note amounted to an adoption of the terms of the note including the recital "for value received," therefore was a valid binding contract. Moreover the evidence is ample to support a finding that the time for payment of the note was extended one year in consideration of the additional signatures. It is true the court

below did not find directly that the time was extended one year, but did find that Xavier Maier and the appellant signed the note during the month of December, 1905, which note bore date December 30, 1900, "and thereby promised to pay to the plaintiff the sum of three hundred ($300) dollars according to the terms of said note." The writing signed by the appellant was sufficient compliance with the statute, and the evidence shows that there was an extension of time for the payment of the note in consideration of the signatures of appellant and Xavier Maier. It follows that the judgment below must be affirmed.

By the Court.—The judgment is affirmed.

ROBINSON, Executor, and others, Appellants, vs. MCGINNIS and another, Respondents.

February 21—March 14, 1911.

Witnesses: Competency: Husband and wife: Nominal interest in action.

1. Husband or wife may be a witness in behalf of a codefendant of the other spouse when such defendant spouse has only a representative or nominal interest in the action, even though said defendant spouse may be liable for costs in case of defeat.
2. The custodian of personal property who is made defendant in replevin with his principal, the owner of such property, is to be considered as having only a nominal interest in the action, within the meaning of the foregoing rule.

APPEAL from a judgment of the circuit court for Waukesha county: MARTIN L. LUECK, Circuit Judge. *Affirmed.*

Geo. E. Robinson, for the appellants.

For the respondents the cause was submitted on the brief of *John A. Kelly.*

TIMLIN, J. The plaintiff, executor of Margaret White, deceased, brought this action of replevin for two certificates of deposit issued to Margaret White in her lifetime and withheld from him by the defendants *Mary McGinnis* and *Charles McGinnis*. No rights of creditors of the estate are involved. The defendant *Mary* answered, claiming ownership by gift from Margaret White, and the defendant *Charles* answered, disclaiming all title or interest and asserting that he held possession only as agent or custodian of the defendant *Mary*. Agnes McGinnis, wife of *Charles*, was, under objection and exception, sworn as a witness on the part of defendants. If she was a competent witness there is testimony sufficient to support the finding that *Mary McGinnis* had title by gift from Margaret White and the judgment must be affirmed. If she was not competent, there is no sufficient testimony to support the finding and judgment must be reversed.

Two lines of precedents exist in this state: one to the effect that the wife of a defendant is not a competent witness for the defense in an action against her husband and another in favor of the latter where her testimony is of such a nature that it would aid her husband as well as his codefendant. *Bartlett v. Clough*, 94 Wis. 196, 201, 68 N. W. 875; *Stewart v. Stewart*, 41 Wis. 624; *In re Valentine's Will*, 93 Wis. 45, 67 N. W. 12. The other is, where one of the spouses sues or defends in a representative capacity the other is a competent witness in the action. *Gordon v. Sullivan*, 116 Wis. 543, 93 N. W. 457, and cases cited. Strictly speaking, neither of these precedents covers the instant case, but in this case the defendants might, on a proper showing, have had separate trials, and thus the testimony of the wife of *Charles* might have been made available to *Mary*. Sec. 2844, Stats. (1898); *U. S. v. Addatte*, 6 Blatch. 76; *Woods v. State*, 76 Ala. 35; *State v. Rainsbarger*, 71 Iowa, 746, 31 N. W. 865; *Whitlow v. State*, 74 Ga. 819. Or if the plaintiff had brought his replevin against *Charles McGinnis*, who had pos-

session of the property, *Charles* could have interpleaded the plaintiff with *Mary* under sec. 2610, Stats. (1898), and the latter could then have availed herself of the testimony of Agnes. The plaintiff ought not to be able to prevent this by merely adding *Mary* as a party defendant in this possessory action. Ceremonies of procedure should not obstruct justice, and what might have been done indirectly through either of the foregoing methods should not result in reversal of the judgment when directly done unless some paramount rule of law is transgressed by this direct action. These ceremonies seem unnecessary in a case like the present, where the husband has no substantial interest in the result of the action except his liability to costs. We adopt the rule that one of the spouses may be a witness in behalf of a codefendant of the other spouse when such defendant spouse has only a representative or a nominal interest in the action, even though said defendant spouse be subject to costs in case of defeat. We consider the custodian of personal property who is made defendant in replevin with his principal, the owner of such property, as one having only a nominal interest.

By the Court.—Judgment affirmed.

BRYDEN, Respondent, vs. CAIRNCROSS and another, Appellants.

February 21—March 14, 1911.

Bills and notes: Collateral security: Indorsement: Waiver of demand, etc.: Mortgages: Foreclosure: Homestead: Exhausting remedy on collateral.

1. The indorsement and delivery of a note, by the payee to a third person, before maturity, as collateral security, with waiver of demand and notice of nonpayment, amounts to an absolute agreement on his part to pay the note at maturity if the maker fails to do so.

2. Where a note is so indorsed and delivered as collateral security to a debt of the indorser, it is no defense to an action upon the principal debt that the plaintiff failed to enforce collection of such collateral note, since defendant was under contract to pay it and might then enforce it himself.
3. Where a debt of $2,000 was secured by mortgage of real estate worth $11,500, including a homestead worth $9,000, and also by a note for $500 subsequently given as collateral, on which the mortgagor was liable as indorser,—the mortgaged land being thus ample to pay the judgment on foreclosure and still leave the $5,000 homestead exemption intact,—there was no reason why the mortgagee, seeking to foreclose, should be compelled to exhaust first his remedy against the maker of the collateral note, either to exonerate the realty as a whole or to save the homestead.
4. The fact that the homestead had been conveyed by the mortgagor to his wife subsequent to the mortgage furnished no reason for compelling the mortgagee to exhaust his remedy on the collateral note in order to preserve her rights, especially where she not only signed the mortgage, but afterwards, when plaintiff purchased it, signed a declaration stating the amount due thereon and that it was a valid lien on the property, and in her answer alleged that said collateral note was her separate property.
5. If the maker of the collateral note had a defense thereto which was not available against the indorsee as a *bona fide* holder, that would furnish an additional reason why the latter should not and perhaps could not be compelled to enforce collection of it until the remedy on the mortgage was exhausted.

APPEAL from a judgment of the circuit court for Waukesha county: MARTIN L. LUECK, Circuit Judge. *Affirmed.*

On August 2, 1892, the defendant *George A. Cairncross* executed and delivered his promissory note to Samuel E. Dale, whereby he agreed to pay said Dale $2,500 with interest at six per cent. three years after date. To secure the payment of this note said *George A. Cairncross* and *Jean B. Cairncross,* his wife, executed a mortgage on certain real estate, part of which constituted the homestead of said defendants. Thereafter Dale duly assigned the note and mortgage to one Minnie L. Davis, who in turn assigned the same on October 14, 1903, to the plaintiff, *James Bryden.* In the

meantime $500 had been paid on the principal. The defendant *George A. Cairncross* induced said *Bryden* to purchase said note and mortgage, and as part of the transaction and as additional security indorsed and transferred to said *Bryden* a note for $500 executed by one A. D. Agnew to said *George A. Cairncross.* On the transfer of such note and mortgage the plaintiff loaned to said *Cairncross* the sum of $100 in addition to the amount due on the note and mortgage assigned to him. The Agnew note has not been paid, although interest thereon has been regularly paid by the maker, and the court found that he was as solvent when the suit was brought as he was at the time the note became due, and that defendants sustained no loss or damage by reason of the failure of the plaintiff to collect the note. Such note has been long past due. Prior to the commencement of the action the defendant *Jean B. Cairncross* made a tender of the amount due on the note and mortgage, except the sum of $400.

This action is brought by the plaintiff to foreclose his mortgage. The defendants answered separately. Each of the defendants avers by way of answer that the plaintiff in reality purchased the Agnew note and that the amount thereof, less the sum of $100 advanced at the time the transaction took place, should be credited on the note. The defendant *Jean B. Cairncross* further answered that such note was her separate and individual property at the time it was assigned to the plaintiff by her husband; that plaintiff had extended the time of payment of the same from time to time without her consent, and that subsequent to the assignment of the note and mortgage to the plaintiff she became the owner of a portion of the mortgaged premises; that a portion of said premises was occupied by her as a homestead, and that the plaintiff should be compelled to credit the sum of $400 on account of the Agnew note as a payment on the note sued upon. The trial court in substance found that the Agnew note was taken by the plaintiff as collateral security and that there was no

agreement on the part of the plaintiff to accept the same as part payment on the indebtedness secured by the mortgage and no agreement whereby the plaintiff bound himself to exhaust his remedies against Agnew upon the note before the foreclosure of his mortgage. On practically all of the disputed issues in the case the court made findings favorable to the plaintiff, and ordered judgment of foreclosure and sale for the full amount claimed to be due upon the note and mortgage of the defendants. From such judgment the defendants appeal.

For the appellants there was a brief by *M. H. Brand,* attorney, and *Ernst Merton,* of counsel, and oral argument by *Mr. Merton.*

For the respondent there was a brief by *C. H. Winkenwerder* and *Chas. T. Hickox,* of counsel, and oral argument by *Mr. Hickox.*

BARNES, J. The appellants insist that the court erred (1) in not compelling the plaintiff to exhaust his remedy against Agnew on the note, and thereby save the appellants from paying more than $1,600 and interest on the mortgage debt; (2) in not compelling the plaintiff to exhaust such remedy to save the homestead of the appellants; and (3) in not compelling the plaintiff to exhaust such remedy to save the property of *Jean B. Cairncross* and not compel her to pay her husband's debts.

1. *Cairncross* indorsed the Agnew note and waived demand and notice of nonpayment thereof and then delivered it to the plaintiff, and the court found that such note was delivered to secure a new loan of $100 and as collateral security for the payment of the note secured by the real-estate mortgage. This transaction amounted to an absolute agreement on the part of the indorser to pay the note at maturity if the maker did not do so. *Hoover v. McCormick,* 84 Wis. 215, 217, 54 N. W. 505; *Mallory v. Lyman,* 3 Pin. 443. It is

apparent, therefore, if the finding of the court is correct, that *Cairncross* violated his plain contract duty, and he is not in a position to claim with very good grace that the plaintiff should have enforced collection of the note when he himself was under contract to pay the amount of it to the plaintiff and might then enforce collection of it. *Winkler v. Magdeburg,* 100 Wis. 421, 76 N. W. 332; *Fanning v. Murphy,* 126 Wis. 538, 105 N. W. 1056. Delay or passivity on the part of the creditor did not discharge the indorser or relieve him from his contract obligation. *Day v. Elmore,* 4 Wis. 190; 2 Daniel, Neg. Inst. (5th ed.) §§ 1311, 1326, 1328; *Hoover v. McCormick, supra; Loverin & B. Co. v. Travis,* 135 Wis. 322, 115 N. W. 829. The evidence is ample to sustain the finding of the court that the plaintiff accepted the note as collateral security in the first instance, and not as a payment on the note secured by the real-estate mortgage. Likewise, the evidence is abundant to support the conclusion of the court that the plaintiff did not make the note his own by his subsequent conduct.

2. The mortgage covered property occupied as the homestead of the defendants and worth $9,000 and other property worth $2,500, leaving security over and above the amount of the homestead exemption to the amount of $6,500. The foreclosure judgment amounts to $2,413.77. It is very evident, therefore, that the mortgaged property is ample to pay the mortgage debt and still leave the $5,000 homestead exemption intact. But if this were not so, we perceive no reason in this case why those who claim to be endeavoring to protect their homestead should not pay the plaintiff the amount due on the Agnew note and proceed to collect it themselves. On May 24, 1910, about a month before this action was begun, the defendants tendered to the plaintiff $1,755 in full payment of the mortgage debt, and thereafter deposited the amount of such tender in court. So it is quite apparent that they were not debarred from taking up the Agnew note because of inability to do so.

3. On February 26, 1910, the defendant *George A. Cairncross* deeded the homestead to his wife, and it is contended by the appellants that under the decisions in *C. Gotzian & Co. v. Shakman,* 89 Wis. 52, 61 N. W. 304, and *Dahlman v. Greenwood,* 99 Wis. 163, 170, 74 N. W. 215, the plaintiff should be compelled to exhaust his remedies against Agnew in order to preserve the rights of the purchaser of the equity of redemption. The cases cited have no application to the situation before us. The wife, if she purchased anything, purchased an equity of redemption. As such purchaser she stands in the same position as the principal debtor. She bought subject to the mortgage. The property was subject to all outstanding liens to the same extent that it was before. *Larson v. Oisefos,* 118 Wis. 368, 373, 95 N. W. 399. There are additional reasons in this case for saying that the wife cannot compel the plaintiff to engage in a lawsuit with Agnew. She not only signed the original mortgage, but at the time the plaintiff purchased it, and as a condition of his doing so, she signed a declaration reciting that there was $2,000 and interest from August 2, 1903, at six per cent. due on the note in suit, and that such indebtedness was a valid lien on the property involved, and in her verified answer she alleged that she, and not her husband, was the owner of the Agnew note.

There is a suggestion made in the brief of the appellants to the effect that Agnew may have some defense to the payment of his note in a suit brought by the payee named therein which would not be available against the plaintiff, who became a *bona fide* holder of it for value before maturity. If this be true, it furnishes a reason why the plaintiff should not and perhaps could not be compelled to enforce collection of it until the mortgage security was exhausted. *Union Nat. Bank v. Roberts,* 45 Wis. 373, 379.

By the Court.—Judgment affirmed.

STATE EX REL. CAZIER VS. TURNER, Judge.

February 21—March 14, 1911.

Ne exeat: *Denial of writ: Appealable order:* Mandamus.

1. **The circuit court, having jurisdiction to issue a writ of *ne exeat*, has also jurisdiction to deny it.**
2. **The writ of *ne exeat* is a provisional remedy and, an order denying the writ being appealable, the supreme court will not by *mandamus* compel the circuit court to vacate such an order.**

APPLICATION to this court for a writ of *mandamus* against the Honorable WILLIAM J. TURNER, judge presiding in the circuit court for Racine county in the absence of Honorable E. B. BELDEN, to compel Judge TURNER to vacate certain orders denying motions of the relator for a writ of *ne exeat* against Elmer W. Hart and commanding him to issue said writ.

Martin J. Gillen, for the relator.

For the respondent there was a brief by *Kearney, Thompson & Myers,* and oral argument by *T. M. Kearney.*

TIMLIN, J. The relator is plaintiff in an action against Elmer W. Hart and others pending in the circuit court for Racine county before Judge WILLIAM J. TURNER. The action so pending is a suit in equity to set aside certain written instruments on the ground of fraud and for an accounting. The defendant Elmer W. Hart is a nonresident of this state and was in attendance upon said circuit court at Racine for the purpose of defending in that cause. The relator moved the circuit court to issue a writ of *ne exeat,* and that court on January 31, 1911, after hearing, by order denied the application for the writ. The application was renewed later and again denied on its merits. The circuit judge filed an opinion in writing stating the grounds in fact and in law for his decision.

The record is voluminous and the arguments and briefs of counsel cover a wide and interesting legal field. One objection lying at the threshold of the proceeding in this court is fatal to the application and only that will be noticed.

The circuit court has by statute (secs. 2784, 2785, Stats. 1898) and by its authority as a court of general equity jurisdiction power to issue this writ. It follows that it has jurisdiction to deny the writ. The power to issue includes the power to refuse to issue. A writ of *ne exeat* is a provisional remedy under our statute, because it is to be issued in an action at the time of issuing the summons or at any time afterward before judgment. The writ of *ne exeat* is in the nature of equitable bail, issued only by the special order of the court when the party is about to leave its jurisdiction and make its decree ineffectual. *Dean v. Smith,* 23 Wis. 483. It is ancillary to the action in which it is issued. It is analogous to an order of arrest in an action at law, which is also held to be a provisional remedy. *Pratt v. Page,* 18 Wis. 337; *Waterhouse v. Freeman,* 13 Wis. 339; *Jarvis v. Barrett,* 14 Wis. 591; *Chase v. Hill,* 13 Wis. 222; *Bell v. Olmsted,* 18 Wis. 69. See, also, *Witter v. Lyon,* 34 Wis. 564, 575, and Thompson on Provisional Remedies, there referred to, ch. 6. It is neither an action nor a special proceeding. Sec. 2594, Stats. (1898). An order refusing a provisional remedy is appealable. Sec. 3069, subd. 3. Other serious objections to the issue of the writ in the instant case might be put forward, but this is enough.

By the Court.—The peremptory writ of *mandamus* is denied to the relator.

MENASHA WOODEN WARE COMPANY, Respondent, vs. MITCHELSTETTER and another, Appellants.

February 22—March 14, 1911.

Sales: Construction of contract: Specific quantities.

1. Plaintiff, after examination, bought from defendants certain machinery and also a mass of raw material the exact amount of which could not be determined by inspection. The bill of sale specified the quantities, including "620 cords of 13-inch pail staves at $3 per cord, valued and sold at $1,860," and "1,200 cords of 26-inch bolts, which is equal to 2,400 cords of 13-inch staves, valued and sold at $3 per cord, $7,200." *Held*, that the quantities so specified were binding on the defendants and could not be treated as mere estimates.
2. There being conflicting evidence as to whether or not the 1,200 cords of 26-inch bolts in fact made 2,400 cords of 13-inch staves, a construction of the contract by the trial court as requiring defendants only to deliver the 1,200 cords of bolts and not as warranting the number of staves that would be produced therefrom, was as favorable to defendants as the terms of the contract will permit.

APPEAL from a judgment of the circuit court for Brown county: S. D. HASTINGS, Circuit Judge. *Affirmed.*

Action to recover purchase price of goods paid for but not delivered. On May 15, 1901, plaintiff bought of the defendants goods described in the contract of purchase as follows:

One (1) bottom lathe.	
One (1) rotary matcher.	
The remains of pail lathe, which consists of stands and spindles.	
Four boxes of stave saws	$1,000 00
620 cords of 13-inch pail staves at $3 per cord, valued and sold at	1,860 00
1,200 cords of 26-inch bolts, which is equal to 2,400 cords of 13-inch staves, valued and sold at $3 per cord	7,200 00
15 tons, 1,300 lbs. of 5–8 No. 23 gauge hoop irons at $3 per hundred lbs., valued and sold at	930 00
All of the heading in pile at Seymour at that date, valued and sold at	250 00
100 dozen 30-lb. Taper candy pails, valued and sold at	125 00
Making a total of	$11,365 00

The full purchase price was paid to the defendants before the goods were delivered, and after delivery plaintiff claimed there was a shortage in the 620 cords of thirteen-inch staves, in the 1,200 cords of twenty-six-inch bolts, and in the 100 dozen candy pails. It admitted that the defendants had performed extra work in and about the bolts, at its request, of the agreed value of $173.21, which sum should be deducted from the amount found due to it. Defendants pleaded full performance of the contract, and admitted that the amount of $173.21 for extra work stated in plaintiff's complaint was correct. A jury was waived. The court found as to the shortage:

"That there was, at the time said contract and bill of sale were executed and said sum paid, at Seymour all of the property described therein, except the staves and bolts and pails, and that there were but 579 cords of 13-inch staves there at that time; and there were there at that time but 1,050 cords of 26-inch bolts; and there were there at that time but 93 7-12 dozen of said pails.

"That said plaintiff paid to said defendants (included in said $11,365) for forty-one cords of staves at $3 per cord, which were not at Seymour as represented and which the plaintiff never received, the sum of $123; and for 150 cords of 26-inch bolts at $6 per cord, which were not at Seymour as represented by said defendants and which the plaintiff never received, the sum of $900; and paid said defendants for 6 5-12 dozen pails which were not at Seymour as represented by said defendants and which said plaintiff never got, the sum of $8.05."

As conclusions of law the court found:

"1. That by their said contract and bill of sale said defendants passed to said plaintiff the title to so much of the articles described in it as were at Seymour at the time of the execution and delivery.

"2. That by the terms of said contract the defendants guaranteed to said plaintiff that there was at Seymour at that time all of the articles described therein.

"3. That said staves and bolts were bought and sold at an agreed price per cord, viz.: the staves at $3 per cord and said bolts at $6 per cord, and said pails were bought and sold at $1.25 per dozen.

"4. That the plaintiff is entitled to recover from said defendants for so much of said goods as it paid for, which were not at said time at Seymour and which it never received, viz.:

For staves	$123 00
For bolts	900 00
For pails	8 05
Total	$1,031 05
Less amount of counterclaim	173 21
	$857 84

"And that the plaintiff is entitled to interest on said amount at six per cent. per annum from May 15, 1901, making the total amount for which the plaintiff is entitled to judgment $1,202.20; and it is ordered that judgment be entered for said plaintiff against said defendants for $1,202.20 and costs to be taxed by clerk."

From a judgment entered accordingly the defendants appealed.

A. M. Spencer, for the appellants.

Silas Bullard, for the respondent.

VINJE, J. The main contention of the defendants is that the court erred in construing the contract to call for the delivery of specific quantities of materials, and especially as to the 1,200 cords of twenty-six-inch bolts equal to 2,400 cords of thirteen-inch staves. It is argued that inasmuch as the evidence shows that Mr. Noble, who represented the plaintiff, went to Seymour before the contract was entered into and inspected the material purchased, it was a sale and purchase of whatever material was there and not of specific quantities; that the quantities set out in the contract, especially as to the 2,400 cords of thirteen-inch staves, were mere estimates. It will be observed from the findings of the trial court that it

did not construe the contract to require the defendants to furnish 2,400 cords of thirteen-inch staves, but that it did require them to furnish 1,200 cords of twenty-six-inch bolts. In holding that the defendants were required to deliver the quantities specified in the contract, the trial court was undoubtedly right. A mass of raw material, amounting in value to about $10,000, aside from the machinery, was purchased. No one by a mere inspection, no matter how minute, could estimate the exact amount thereof, and hence the amounts bought and sold were inserted in the contract, and the quantities therein named became binding upon the parties. The plaintiff, having paid for the total quantities called for by the contract, was entitled to a delivery of the same, or, in case of a default in delivery of it, if it so elected, to a refund of the purchase price of the material not delivered. *Ingram v. Rankin,* 47 Wis. 406, 2 N. W. 755.

A great deal of evidence was introduced on the question as to whether or not the 1,200 cords of twenty-six-inch bolts made 2,400 cords of thirteen-inch staves. In our view of the case this becomes immaterial, because the trial court, as before stated, held the contract called only for the delivery of 1,200 cords of bolts. It is true that, in arriving at the number of cords of bolts actually delivered, recourse was had to the number of cords of staves delivered, but the trial court in reaching the amount of shortage in bolts did so solely upon the basis of what a cord of bolts as it existed in defendants' yard at Seymour actually did produce in staves, and not upon the basis of what it might be claimed it should produce as per contract, namely, two for one. So defendants were relieved from any warranty as to the number of staves that would be produced from the 1,200 cords of bolts and held only to the duty of delivering the 1,200 cords which the contract called for. They certainly are in no position to successfully attack such a construction of the contract. It is as favorable to them as the terms thereof will permit.

It is also urged that the findings of the trial court are not supported by the evidence. The court found there was a shortage, as follows: 41 cords of staves at $3 per cord, $123; 150 cords of 26-inch bolts at $6 per cord, $900; 6 5-12 dozen candy pails at $1.25, $8.05; and in doing so it is evident the court did, as stated in its opinion, resolve every doubt in favor of the defendants. Not only are the findings supported by the evidence, but we think, from a careful perusal of it, that they are in accordance with the preponderance thereof. Defendants, therefore, fall far short of showing themselves entitled to a reversal of the judgment on that ground. *Daubner v. McFarlin,* 136 Wis. 515, 117 N. W. 1002.

By the Court.—Judgment affirmed.

SURING, Respondent, vs. ROLLMAN and another, imp., Appellants.

February 22—March 14, 1911.

Boundaries: Location of quarter-section corner: Quieting title: Cloud: Plats: Actual location on other land: Claim of title: Pleading: Joinder of causes and parties: Appeal: Harmless error: Equity: Inadequate remedy at law: Cancellation of instruments.

1. Evidence of early landmarks, blazed lines, and bearing trees now destroyed is *held* to sustain the location of a quarter-section corner in accordance therewith, and not as a lost corner, although the quarter-post itself had disappeared and such location resulted in throwing into the west half of the section nearly the whole of an overrun or surplus of about five chains in the south line of the section.
2. Where plaintiff owned lands adjoining a certain quarter-section line on the west, and defendants made and recorded a plat of lands purporting to adjoin the same line on the east, but in fact, owing to a dispute as to the true location of the quarter-section corner, the plat as located and staked out on the ground encroached upon plaintiff's land, and defendants were claiming

title to the strip in question and were selling parts of it to others, an action would lie under sec. 3186, Stats. (1898), to remove a cloud from plaintiff's title, if such disputed strip was either in his actual possession or vacant.

3. Even if there was a misjoinder of causes of action in a complaint *quia timet* against one defendant not in possession and another in possession of a part only of the land in dispute, the error in overruling a demurrer on that ground will not, under sec. 3072*m*, Stats. (Laws of 1909, ch. 192), be cause for reversal after a trial on the merits, unless some substantial right of the appealing defendants has been affected thereby.

4. Under the circumstances above stated there is a good cause of action in equity, independent of sec. 3186, Stats. (1898), to remove the cloud upon plaintiff's title caused by the recording of defendant's plat. Though such plat purports to cover only land east of plaintiff's line, yet its effect as a claim of title, when construed in connection with its accompanying survey, extends to the corners and boundary lines actually established and marked on the ground.

5. In such case the plat, being an entirety, can and should be attacked as a whole, and all persons interested in the result of the attack should be made parties, even though their claims be several.

6. The remedy at law in such a case is not adequate, since the only real and effective relief would be the cancellation of that part of the plat actually located upon the plaintiff's land and of the conveyances of lots according to the plat so far as they affect such land.

7. The common-law action *quia timet* may be brought when plaintiff is out of possession and defendant in possession in a case where defendant has apparent title, the invalidity of which can only be shown by evidence *aliunde* the record; and the remedy is not confined to cases of fraud but extends to cases where, in order to give effectual relief, there must be reformation, cancellation, or surrender of deeds, conveyances, or records affecting the title.

APPEAL from a judgment of the circuit court for Oconto county: S. D. HASTINGS, Circuit Judge. *Affirmed.*

This is an action in equity to remove alleged clouds upon the plaintiff's title to land, and from judgment in plaintiff's favor the defendants *Rollman* and *Johnson* appeal.

The plaintiff is the owner of lot 4 in section 12, town 29

It is also urged that the findings of the trial court are not supported by the evidence. The court found there was a shortage, as follows: 41 cords of staves at $3 per cord, $123; 150 cords of 26-inch bolts at $6 per cord, $900; 6 5-12 dozen candy pails at $1.25, $8.05; and in doing so it is evident the court did, as stated in its opinion, resolve every doubt in favor of the defendants. Not only are the findings supported by the evidence, but we think, from a careful perusal of it, that they are in accordance with the preponderance thereof. Defendants, therefore, fall far short of showing themselves entitled to a reversal of the judgment on that ground. *Daubner v. McFarlin,* 136 Wis. 515, 117 N. W. 1002.

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2. Where plaintiff owned lands adjoining a certain quarter-section line on the west, and defendants made and recorded a plat of lands purporting to adjoin the same line on the east, but in fact, owing to a dispute as to the true location of the quarter-section corner, the plat as located and staked out on the ground encroached upon plaintiff's land, and defendants were claiming

title to the strip in question and were selling parts of it to others, an action would lie under sec. 3186, Stats. (1898), to remove a cloud from plaintiff's title, if such disputed strip was either in his actual possession or vacant.

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7. The common-law action *quia timet* may be brought when plaintiff is out of possession and defendant in possession in a case where defendant has apparent title, the invalidity of which can only be shown by evidence *aliunde* the record; and the remedy is not confined to cases of fraud but extends to cases where, in order to give effectual relief, there must be reformation, cancellation, or surrender of deeds, conveyances, or records affecting the title.

APPEAL from a judgment of the circuit court for Oconto county: S. D. HASTINGS, Circuit Judge. *Affirmed.*

This is an action in equity to remove alleged clouds upon the plaintiff's title to land, and from judgment in plaintiff's favor the defendants *Rollman* and *Johnson* appeal.

The plaintiff is the owner of lot 4 in section 12, town 29

north, of range 17 east, in Oconto county, Wisconsin. This lot is the fractional southeast quarter of the southwest quarter of the section. The defendants *Rollman* and *Johnson* are partners and own the southwest quarter of the southeast quarter of the same section immediately adjoining plaintiff's land on the east, except three small village lots owned respectively by the defendants School District No. 3, the M. E. Church of the village of Suring, and Julius Jasperson. The parcels owned by the three last named defendants are lots in a plat of part of the southwest quarter of the southeast quarter, made and recorded by the defendants *Rollman* and *Johnson* some years since, and said defendants obtained their title from *Rollman* and *Johnson* before the commencement of this action. Certain mortgagees of said last named lots are also made defendants. The difficulty arises from a disagreement as to the location of the quarter-post on the section line between sections 12 and 13. As matter of fact there is an overrun or surplus of about five chains in the line between the southeast and southwest corners of section 12, both of which corners are well established. The plaintiff's claim is that the original quarter-post on this line was so located that the east half of the section was nearly correct and nearly all the surplus thrown into the west half of the section. While the original stake set by the government surveyors in 1855 is not in existence, the plaintiff claims it has been preserved by landmarks, fences, buildings, and the memories of witnesses, so that it is not a lost corner. On the other hand, the defendants claim that it was in fact a lost corner. In 1897, in the course of some resurveys in section 13, it became necessary to find the quarter-post aforesaid, and the surveyors, not finding the original stake or witness trees, treated the corner as a lost corner, and assumed to set a stake and re-establish the corner at a point half way between the section corners, and this new stake or corner is known as the Melindy and Fitzpatrick stake, and is located 288½ links west of the point where the

plaintiff claims that the government stake was located. These conflicting claims as to the location of the quarter-post cause the entire difficulty.

Some years before this resurvey the plaintiff made and recorded a plat of a part of his land lying in the southeast corner of lot 4 aforesaid, known as the Suring plat of the village of Suring, and made all his measurements from the point claimed by him to be the government quarter-post. In 1897, after the setting of the Melindy and Fitzpatrick stake, the defendants *Rollman* and *Johnson* and one Clara Krueger made and recorded a plat known as the Krueger plat of the village of Suring, which covered a part of the land lying in the southwest quarter of the southeast quarter of section 12, and commenced all measurements from the Melindy and Fitzpatrick stake. Thus the two plats are side by side and do not interfere with each other so far as the descriptions and maps on file in the register's office show, but as matter of fact as laid out on the ground the Krueger plat overlaps considerably the Suring plat. It is the strip of land thus overlapped by both plats as they were actually located on the ground which is in controversy here. The defendants School District No. 3, M. E. Church, and Jasperson respectively own parcels in the Krueger plat on the dividing line between that plat and the plaintiff's land, and have taken possession of the strip opposite their respective parcels up to the Melindy and Fitzpatrick line. As to the balance of the strip up to the north line of plaintiff's land, the plaintiff is in possession of a part of it and a part is vacant. A number of other persons owning lands in sections 12 and 13, which are bounded by the north and south center line of the sections and whose boundary line would be affected by a change in the location of the quarter-section corner aforesaid, were made defendants as having some interest in the controversy. Certain mortgagees of the Jasperson lot were also joined as defendants, but no defendant answered except the appellants.

The plaintiff's complaint set forth at length the foregoing facts, and the appellants *Rollman* and *Johnson* demurred thereto generally and on the ground that several causes of action had been improperly united. This demurrer having been overruled, the appellants answered on the merits denying that they made any claim to respondent's land or any part of it by plat or otherwise, and the action was tried by the court. The court found in effect that the original government survey placed the quarter-post in question at the point claimed by plaintiff, and that it was not a lost corner, hence that the Melindy and Fitzpatrick stake was erroneously located. From this premise it was found and adjudged that the plaintiff's ownership extended to a line passing through the original government corner northerly to the quarter-post on the north side of section 12, and that the Krueger plat, as well as the premises of the various defendants, does not extend west of that line as claimed, and that said plat and the various deeds in question be canceled so far as they cover land lying west of the quarter line so established. From this judgment the appeal is taken.

For the appellants there was a brief by *Martin, Martin & Martin,* and oral argument by *P. H. Martin.* They cited, among other cases, *Trustees of Kilbourn Lodge v. Kilbourn,* 74 Wis. 452; *Kruczinski v. Neuendorf,* 99 Wis. 264; *Johnson v. Swanke,* 128 Wis. 68; *Mitchell I. & L. Co. v. Flambeau L. Co.* 120 Wis. 545; *Toledo, St. L. & N. O. R. Co. v. St. L. & O. R. R. Co.* 208 Ill. 623; *Dolan v. Smith,* 147 Mich. 276, 110 N. W. 932; *Harvey v. Harvey,* 73 N. H. 106, 59 Atl. 621; *Gray v. Tyler,* 40 Wis. 579; *Kelley v. Kelley,* 80 Wis. 486; *Davenport v. Stephens,* 95 Wis. 456; *Broderick v. Cary,* 98 Wis. 419; *Fox v. Williams,* 92 Wis. 320; *Ill. S. Co. v. Schroeder,* 133 Wis. 561.

For the respondent there was a brief by *Eberlein & Eberlein,* and oral argument by *F. A. Eberlein.* As to plaintiff's right to maintain the action, they cited *Kruczinski v. Neuen-*

dorf, 99 Wis. 264; *Smith v. Zimmerman,* 85 Wis. 542; *Post v. Campbell,* 110 Wis. 378; *Swihart v. Harless,* 93 Wis. 211; *Spiess v. Neuberg,* 74 Wis. 279; *Prickett v. Muck,* 74 Wis. 199; *Burrows v. Rutledge,* 76 Wis. 22; *Gibson v. Gibson,* 102 Wis. 501. Upon the question of misjoinder: *Beatty v. Dixon,* 56 Cal. 619; *Moon v. McKnight,* 54 Wis. 551; *Whetstone v. Beloit S. B. Co.* 76 Wis. 613; *Ellis v. N. P. R. Co.* 77 Wis. 114; *Draper v. Brown,* 115 Wis. 361; *Level L. Co. v. Sivyer,* 112 Wis. 442; *Seering v. Black,* 140 Wis. 413; *Herman v. Felthousen,* 114 Wis. 423; *Adkins v. Loucks,* 107 Wis. 587; *Simon v. Weaver,* 143 Wis. 330. To the point that the original location of the quarter-post will prevail over a resurvey: *Knoll v. Randolph,* 3 Neb. (Unof.) 599, 92 N. W. 195; *Pereles v. Gross,* 126 Wis. 122, 105 N. W. 217; *Gilman v. Brown,* 115 Wis. 1; *Rowell v. Weinemann,* 119 Iowa, 256, 93 N. W. 279; *Clark v. Thornburg,* 66 Neb. 717, 92 N. W. 1056; *Baty v. Elrod,* 66 Neb. 735, 92 N. W. 1032; *Mills v. Penny,* 74 Iowa, 172, 37 N. W. 135; *Brew v. Nugent,* 136 Wis. 336, 117 N. W. 813; *Shrake v. Laflin,* 3 Neb. (Unof.) 489, 92 N. W. 184; *Lampe v. Kennedy,* 60 Wis. 110; and other authorities.

WINSLOW, C. J. Upon the disputed question of fact in this case we shall make no extended remarks. The circuit judge, with his accustomed care and industry, analyzed the evidence in a written opinion which is perfectly satisfactory to us upon this question. There was much evidence of early landmarks, blazed lines, and the existence of bearing trees now destroyed, which strongly supported the contention of the plaintiff as to the original location of the quarter-post in question, and we think we should have reached the same conclusion which he reached were we required to pass upon the controversy as a court of first instance.

The question of fact being settled, the only remaining questions arise out of the demurrer to the complaint which was

overruled before the answer upon the merits was interposed. That presented two questions: *first,* whether there was not a complete remedy at law; and, *second,* whether two causes of action had not been improperly joined.

It will be seen by the statement of facts that the appellants here are the only defendants who appeared in the case or answered. If, therefore, as to them a good cause of action in equity was stated, it necessarily follows that the demurrer was properly overruled so far as the first ground is concerned. The circuit judge held that there was a good cause of action stated under sec. 3186, Stats. (1898), *i. e.* a good statutory cause of action to remove a cloud from the title of real estate. We can see no good reason for doubting this conclusion. The statute referred to has considerably enlarged the equity powers of the court in this direction.

A written memorandum, unwitnessed, unacknowledged, and unrecorded, and which contained no description of land which could be located, was held by this court to be a cloud or claim which would support an action to remove it, when the defendant persisted in claiming that he was entitled to some interest in certain lands under it. Here it appears that the answering defendants put on record a plat of land, acknowledged and certified as the statute requires, and that said plat is actually located and staked out on the ground and covers the disputed strip of land; further, that the defendants have claimed and are still claiming title to the disputed strip and are selling parts of it to others. This seems a tolerably robust setting up of claim to land, quite sufficient under the decisions to justify an action under sec. 3186, when the plaintiff still remains in possession of the land claimed or when the land is vacant. *Fox v. Williams,* 92 Wis. 320, 66 N. W. 357; *Broderick v. Cary,* 98 Wis. 419, 74 N. W. 95.

As to the second objection, there might perhaps be some difficulty in holding as an original proposition that an equitable cause of action under sec. 3186 against one defendant

not in possession could be joined with a cause of action against another defendant in possession of a different parcel; but the question is whether any substantial right of the complaining party has been affected by the adverse ruling, even if erroneous when made. Sec. 3072*m*, Stats. (Laws of 1909, ch. 192). The appellants' substantial rights were simply to meet the plaintiff in a court of equity and submit their proofs on the questions of fact, as well as their arguments upon the legal questions involved, and have such proofs and arguments fairly considered and passed upon. These rights have been fully preserved to them. These were substantially the grounds upon which the trial court disposed of these objections when they were renewed upon the final argument of the case.

It seems to this court, however, that there is another and broader ground upon which the judgment may be affirmed, and that is that there was a good cause of action stated in equity independent of sec. 3186, Stats. (1898), and that all of the parties joined as defendants were proper parties thereto.

For the purposes of the case it may be admitted that a cloud upon title which will justify the bringing of an equitable action for its removal independent of the statute must be some apparent title or incumbrance rendering a resort to evidence *aliunde* the record necessary in order to show its invalidity. *Gamble v. Loop,* 14 Wis. 465; *Pier v. Fond du Lac,* 38 Wis. 470; *Broderick v. Cary,* 98 Wis. 419, 74 N. W. 95.

Does this plat, made and recorded by the defendants, constitute such a cloud? It is true that it purports only to cover land in the southeast quarter of section 12, while plaintiff's land is in the southwest quarter, and hence the argument is that the plat constitutes no cloud on the title to any land owned by the plaintiff. The question, however, is not to be so easily decided. The plat itself does not seem to have been

actually produced in evidence, but it is admitted that its measurements were commenced from the Melindy and Fitzpatrick corner as relocated. Thus it affirmatively appears that as actually located on the ground the plat encroached a number of rods over and upon the plaintiff's land. Our statute governing such plats and authorizing them to be recorded requires as a prerequisite that an accurate survey of the land covered thereby be made, and that the boundaries of all blocks, streets, and alleys, as well as the corners of every lot and block, the beginning and terminus of every street, and every angle of a street, be marked and established in the field by suitable monuments. It further requires that the boundaries of lots and blocks, with the length and courses of all exterior boundary lines, shall appear on the face of the map, and that the monuments shall be represented in their proper places on the map and the material of which they are made noted thereon, and, further, that a certificate of the surveyor, certifying among other things to the correctness of the map, shall appear thereon before the plat is entitled to record.

Presumably all these requirements were complied with on the making and recording of the Krueger plat. It is quite apparent that you cannot divorce the plat from the survey. Under very familiar principles the monuments erected or placed in the ground at the corners of the lots, blocks, and streets control courses and distances named on the plat and fix the location of the corners which they represent. So the plat and survey go hand in hand, and the effect of the plat as a claim of title extends on the west to the corners marked and established on the ground, and thus the plat itself, in connection with the survey and the Melindy and Fitzpatrick corner-post, from which the survey starts, becomes a document on record, which seems apparently to entitle every purchaser of a lot upon the west side of the Krueger plat to assert title up to the line of the actual survey.

Now it is well settled in this state that the common-law action *quia timet* may be brought when the plaintiff is out of

possession and the defendant is in possession in a case where by fraud or other means producing like results the defendant has an apparent title, the invalidity of which can only be shown by evidence *aliunde* the record. In such case the remedy at law by ejectment or trespass is not deemed sufficient, because the plaintiff is entitled to have the apparent title canceled or surrendered, and, as incidental to this equitable relief, the same court will decree the giving up of possession of the premises by the wrongdoer. *Spiess v. Neuberg,* 71 Wis. 279, 37 N. W. 417; *Prickett v. Muck,* 74 Wis. 199, 42 N. W. 256; *Burrows v. Rutledge,* 76 Wis. 22, 44 N. W. 847; *Swihart v. Harless,* 93 Wis. 211, 67 N. W. 413; *Kruczinski v. Neuendorf,* 99 Wis. 264, 74 N. W. 974; *Post v. Campbell,* 110 Wis. 383, 85 N. W. 1032; *Boon v. Root,* 137 Wis. 451, 119 N. W. 121. This remedy is not confined to cases of fraud, but covers cases where, in order to give effectual relief, there must be the reformation, cancellation, or surrender of deeds, conveyances, or records affecting the title. *Allen v. Ellis,* 125 Wis. 565, 104 N. W. 739.

Now in the present case it seems quite apparent that the Krueger plat, in connection with the monuments on the ground, constitutes a standing and continuing claim by all who now own or may hereafter own lots on the west side thereof, that their lots extend to the Melindy and Fitzpatrick line. The plat as located on the ground now does and will always continue to include this disputed strip. The only real and effective relief must be that which the court gave, *i. e.* a cancellation of that part of the plat which actually has been located on the ground on the west side of the correct line. The plat is an entirety and can and ought to be attacked as a whole, and, if so attacked, all the parties interested in the result of the attack, though their claims be several, should be made parties. We have not been referred to any cases precisely similar to this, but it seems to fall within well recognized principles, and we are satisfied was rightly disposed of.

By the Court.—Judgment affirmed.

HOLT LUMBER COMPANY, Appellant, vs. CITY OF OCONTO and another, Respondents.

February 22—March 14, 1911.

Constitutional law: Legislative power: Delegation: Option laws: Municipal corporations: General charter: Sewers: Methods of construction, etc.: Taxation: Quieting title: Cloud: Complaint construed.

1. An option law, to be valid, must be a complete enactment in itself when it leaves the legislature and require nothing to perfect it as a law, the only thing left to the people to determine being whether they will avail themselves of its provisions.
2. The general city charter is an option law in that any city may adopt it or a part of it, but there is no option in the administration of the law after its adoption. Where a city has adopted a particular subchapter, it is bound thereby and cannot abrogate it or any of its provisions.
3. Subch. XX of the general charter (secs. 925—208 to 925—239c, Stats. 1898), relating to the construction and maintenance of sewers and the manner of paying therefor, was designed as one system with authority on the part of the city adopting it to take advantage of the different provisions as occasion might require; and the passage of an ordinance providing that the expense be borne by sewer districts does not preclude the city from afterward making the cost of similar improvements payable out of the general fund or by abutting property owners, and it may at will make use of all three methods at the same time.
4. The fact that under said subch. XX a property owner who has been taxed for the construction of sewers under the district system may, by a subsequent change to the city system, be taxed again for building main sewers in other districts, does not render the law invalid as contravening sec. 1, art. VIII, Const., providing that the rule of taxation shall be uniform.
5. In an action by a taxpayer to set aside certain taxes as a cloud on his title, a complaint alleging that a specific sum was assessed for main sewers, although it further alleges that the report of the board of public works which was adopted included extensions and the rebuilding of branch sewers and the taking up of certain main sewers and relaying the same with larger and different sewers, there being no positive statement that any sum other than the specific sum named was spread upon the tax roll

or became a cloud on plaintiff's title, is *held*, on demurrer, not to show that any tax was levied against plaintiff's land for other purposes than the construction of main sewers or extensions thereof, which alone were chargeable to the general fund.

6. Allegations in such complaint that an ordinance which provided generally for the construction and maintenance of sewers at the expense of sewer districts was repealed by a later ordinance which provided for the cost of main sewers to be paid out of the general fund, are not to be construed as charging that no authority remained in the city to pay for any except main sewers.

APPEAL from an order of the circuit court for Oconto county: S. D. HASTINGS, Circuit Judge. *Affirmed.*

This action was brought to remove a cloud from the title to plaintiff's land created by the assessment and levy of certain taxes upon its real estate in the year 1909 to pay for the construction of sewers proposed to be laid by the defendant city, on the ground that the proceedings of the common council and its officers in the assessment and levy of such taxes were illegal and void and the taxes based thereon consequently illegal and void.

The complaint alleges the corporate existence of the plaintiff and of the defendant city, and that the defendant *Classon* is city treasurer of the defendant city; that the plaintiff is the owner of the lands in question; that the taxes assessed against the real estate of plaintiff in said city for 1909 are $2,081.04; that the taxes levied upon personal property of plaintiff for 1909 in said city are $10,231; that in August, 1894, by ordinance No. 204, said defendant city was divided into sewer districts; that in May, 1895, by ordinance No. 212, ordinance No. 204 was amended; that on the 3d day of September, 1895, the defendant city, in pursuance of sec. 72, ch. 312, Laws of 1893, and in compliance with the statutes of Wisconsin, passed and adopted ordinance No. 215, whereby said defendant city adopted as part of its charter law subch. XX (secs. 925—208 to 925—239*c*, Stats. 1898) entitled "Sewers;" that in the month of November, 1904, the defendant

city passed an ordinance, No. 277, by the terms of which it adopted the sewer district plan for construction of sewers and provided that the expense should be borne and paid out of the funds of the sewer district within which such sewer or sewers might be constructed; that on February 7, 1905, the defendant city adopted ordinance No. 280, dividing defendant city into sewer districts, which ordinance provided that the cost of constructing and maintaining sewers (which shall include mains, intercepting and all street sewers, manholes, catch-basins, lantern holes, flush tanks, out-falls, and all work connected therewith, except house drain connections) should be borne as provided by ordinance No. 277; that afterwards defendant city constructed and maintained sewers in the sewer districts of said city in pursuance of ordinance No. 277, and paid for the same out of the sewer district funds; that the property of residents and property owners in each sewer district was taxed for the purpose of raising funds for the mains and other sewers laid and constructed in each respective sewer district; that plaintiff was assessed and paid taxes upon its property for such sewers under said district system in accordance with ordinance No. 277; that on October 5, 1909, the defendant city attempted to pass ordinance No. 318, which provided that "the cost of all main sewers hereafter constructed in the city of *Oconto,* except the cost of all catch-basins, overflow pipes, and all temporary catch-basins, the cost of repairing and cleaning of all sewers, and the expenditures for temporary work necessary to carry on the system of sewerage in the city of *Oconto,* shall be paid out of the general fund of the city of *Oconto,* the intention of this ordinance being that no expense of the construction of main sewers shall be paid by the abutting property owners or out of any sewerage district fund;" that said ordinance No. 318 attempted to repeal ordinance No. 277 and sec. 2 of ordinance No. 280 of defendant city and attempted to repeal all ordinances conflicting with ordinance No. 318; that on November 30, 1909, the

board of public works of defendant city made a report to defendant city whereby it recommended that a levy of $4,014.40 be made out of the general fund of defendant city to cover the cost of main sewers to be constructed on certain designated streets; that said report was adopted and the tax of $4,014.40 levied upon the taxable property of defendant city and the clerk instructed to extend the same upon the tax roll; that the report of said board of public works included not only main sewers but the construction and extension and rebuilding of branch sewers and the taking up of certain main sewers in defendant city and relaying the same with larger and different sewers; that said sum of $4,014.40 was assessed and levied upon the taxable property in defendant city, including the property of plaintiff, and constitutes a part of the so-called "contingent fund" upon the tax roll, which contingent fund amounts to $14,906.30; that the tax roll has been delivered to the defendant *Classon,* treasurer of defendant city, for collection, and that he threatens to collect and return said tax roll, if said taxes are not paid, as delinquent and unpaid; that said tax constitutes a cloud upon the title to plaintiff's real estate; that said taxes, amounting to $4,014.40, so forming a part of the contingent fund, were unlawfully levied, for the reason that the defendant city had theretofore elected, and by ordinance duly passed and adopted determined, that all the costs and expenses for the laying and construction of main and other sewers in the defendant city should be borne and paid out of the sewer districts within which such sewers were laid, and that the city had no power to thereafter change the system of paying for the construction and maintaining of main and other sewers and to assess and levy taxes for and to pay the same out of the general or contingent fund of defendant city; that plaintiff is ready and willing to pay its just portion of the taxes legally and lawfully levied and assessed against its real estate; that the defendant city and its officers threaten and are about to carry into effect the recommenda-

tion of the board of public works for the construction of main and other sewers above mentioned; that if defendant city proceeds to construct such sewers it will result in imposing upon the lands of the plaintiff the unlawful burden and taxes for the payment of sewers in other sewer districts than those in which the plaintiff has property and which such sewer districts have heretofore constructed and paid for the main and other sewers within such district or districts out of the sewer district fund of such district.

The plaintiff prays that the city be enjoined from collecting said taxes and that such taxes be declared null and void and the cloud created thereby be removed and ordinance No. 318 be adjudged null and void; that the court ascertain the amount of taxes lawfully assessed upon the plaintiff's real estate; and that plaintiff have general relief.

The defendants demurred to the complaint for want of facts sufficient to constitute a cause of action. From the order sustaining such demurrer this appeal was taken.

For the appellant there was a brief by *Allan V. Classon* and *Eastman & Martineau,* and oral argument by *Mr. Classon* and *Mr. E. C. Eastman.*

For the respondents there was a brief by *P. H. Lynch,* city attorney, and *V. J. O'Kelliher* and *Gill & Chase,* attorneys, and oral argument by *Mr. J. J. Gill* and *Mr. O'Kelliher.*

KERWIN, J. The material allegations of the complaint, in so far as they form a basis for the plaintiff's alleged right to recover, are set out briefly in the statement of facts. The learned trial judge in sustaining the demurrer wrote an opinion, which is in the record, in which he discusses various provisions of subch. XX of the general charter law (secs. 925—208 to 925—239*c,* Stats. 1898) as they bear on the ordinances passed by the defendant city, and arrives at the conclusion that the complaint states no cause of action, and we are of the opinion that the conclusions reached by the trial judge are correct.

Two main contentions are made by appellant's counsel as grounds for reversal of the order appealed from: (1) That sec. 925—208, being the first section of subch. XX, is an option law, and that when the city exercises its option thereunder and elects one of the methods of payment for sewers its power in that regard is exhausted and it cannot change to any of the other methods provided therein; and if the statute permits the change it is unconstitutional. (2) That if it be held that sec. 925—208 is not an option law and that the statutes in question are constitutional, there is no authority for payment for any sewer work other than for main sewers, and that the tax is void because levied for sewers other than main sewers.

The defendant city was divided into sewer districts under its special charter in May, 1895, by ordinance No. 212, and subch. XX of the general charter was adopted in September, 1895. In November, 1904, ordinance No. 277 was passed, which provided that the cost of all sewers should be paid out of the funds of the sewerage district within which the sewer or sewers may be constructed. In February, 1905, the defendant city passed ordinance No. 280, which divided the city into sewer districts and amended the prior ordinance and confirmed the method of paying for constructing and maintaining sewers as provided by ordinance No. 277. Afterwards and in October, 1909, ordinance No. 318 was passed, which provided that the cost of all main sewers thereafter constructed, except the cost of catch-basins, overflow pipes, and temporary catch-basins, the cost of repairing and cleaning sewers, and the expenditures for temporary work necessary to carry on the system of sewerage, should be paid out of the general fund, the intention being that no expense for the construction of main sewers should be paid by abutting property owners or out of any sewerage district fund.

It is strenuously insisted by counsel for appellant that the defendant city had no power to pass ordinance No. 318, because it had no authority to change the method of payment for

sewers,—that its power in that regard, having been exercised by the passage of a prior ordinance, was exhausted. Counsel relies upon *Northern T. Co. v. Snyder,* 113 Wis. 516, 89 N. W. 460; *State ex rel. Williams v. Sawyer Co.* 140 Wis. 634, 123 N. W. 248, and some Pennsylvania cases; also *Atlantic City W. W. Co. v. Atlantic City,* 39 N. J. Eq. 367, and *East Tenn., Va. & Ga. R. Co. v. Frazier,* 139 U. S. 288, 11 Sup. Ct. 517. A careful examination of the cases cited convinces us that they do not support the appellant's contention. The *Northern T. Co. Case* deals with a situation clearly involving an option law, namely, a general law pertaining to county government, giving an option to county boards to severally put the same into effect in their respective counties, and giving no power to repeal their action and restore the former situation, and it was held that, the county board having given effect to the law, it could not abolish such effect. In other words, the case holds that power to give effect to an option law does not carry with it by implication power to abolish it. In *State ex rel. Williams v. Sawyer Co., supra,* the county board passed a resolution adopting the provisions of ch. 651, Laws of 1907, relating to the establishment of special municipal courts in the counties of this state, and it was held that it could not afterwards rescind its action. At page 641 the court said:

"If the law had been properly adopted and the proper resolution had been passed creating the court, it would be beyond the power of a county board by subsequent resolution to rescind its action, at least in the absence of express legislative authority so to do."

This court has ruled that an option law "must be a complete enactment in itself. It must contain an entire and perfect declaration of the legislative will, and it must require nothing to perfect it as a law. The only thing that may be left to the people to determine is whether they will avail themselves of its provisions." *State ex rel. Williams v. Sawyer Co., supra*

(p. 636); *State ex rel. Att'y Gen. v. O'Neill,* 24 Wis. 149; *Slinger v. Henneman,* 38 Wis. 504; *Minneapolis, St. P. & S. S. M. R. Co. v. Railroad Commission,* 136 Wis. 146, 116 N. W. 905; *Adams v. Beloit,* 105 Wis. 363, 81 N. W. 869.

Sec. 926, Stats. (1898), as amended (Laws of 1899, ch. 51: Supp. 1906), provides:

"All cities incorporated by special act shall have the powers, privileges and franchises and be subject to the duties and liabilities in this chapter provided for, as well as those applying to specially incorporated cities in chapters 40*a* and 41, in addition to those provided by the act of incorporation, all conflicting provisions of such special act to the contrary notwithstanding. . . . Any such city may adopt the provisions of any subchapter, section or subdivision of any section of chapter 40*a*, and may exercise any power or franchise thereby conferred upon cities organized under said chapter, in addition to or in lieu of the provisions of its special charter and the powers and franchises therein specified, by an ordinance adopted for that purpose by a three-fourths vote of all the members of the council elect, and when adopted as herein prescribed such ordinance shall operate to that extent as an amendment of such charter. . . ."

The feature of the law in question which gives it character as an option law is the right conferred to allow adoption of the general charter or a part of it and not an option in the administration of the law after adoption. After subch. XX of the general charter was adopted by defendant city it was bound by it and could not abrogate it. *Northern T. Co. v. Snyder,* 113 Wis. 516, 89 N. W. 460. The defendant city could not say it would be bound by some of the provisions adopted and not by all. When it exercised its option it exhausted its power. There is nothing in the law indicating an intention on the part of the legislature to delegate power to the defendant city to reject any provision of subch. XX or modify it after it had been adopted, even if the legislature had power to delegate such authority to the city.

This court has decided, in a case respecting the adoption

of a portion of the general charter, that an option law must be a complete law in all its details when it leaves the legislature, so that nothing is left open save the determination of the fact when it is to go into effect; that any other rule would result in practical delegation of legislative power.

"If the governing body of a municipal corporation can take such parts as it chooses from a complete law, and reject such parts as it chooses, the result will be, not the law which the legislature has enacted, but a law which the corporation has enacted. In such a case the legislature has never said that the parts chosen by the corporation should constitute a law, standing by themselves, but the governing body of the corporation has said so. This must be legislation, or it is nothing; and, if it be legislation, it is legislation by the municipal corporation, and not by the legislature." *State ex rel. Boycott v. Mayor, etc.* 107 Wis. 654, 84 N. W. 242.

Now it seems plain that when the defendant city adopted subch. XX, which is a complete enactment, it had exhausted its power so far as the subchapter adopted was concerned under the doctrine of the cases heretofore cited, and that the ordinances providing for the construction of sewers were acts of administration under the subchapter after its adoption. As we understand the argument of appellant it is contended that subch. XX provides three modes of constructing and maintaining sewers, namely: (1) by the city at large; (2) by sewer districts; and (3) by abutting property owners. And it is argued that when the first ordinances were passed, providing for the payment by districts, the city could not afterwards change to any other system, because it had exhausted its power in that regard. We think a careful reading of subch. XX will show that it was designed as one system, and not three, with authority on the part of the city adopting it to take advantage of the different provisions as occasion might require, and that the exercise of one method did not eliminate the other methods. In other words, it was the manifest intention of the legislature, as shown by the different sections of the

statute, that all three methods might be used at the same time. Therefore the right vested in the city by adoption of subch. XX was the right to exercise the three methods. We shall briefly refer to some of the provisions of the law which show that the three methods prescribed were calculated to be used together.

The first section of subch. XX, sec. 925—208, Stats. (1898), provides that "All cities shall have full power to construct systems of sewerage and to provide for the payment for sewers by the city, by sewerage districts, or by abutting property owners." This section further provides that no city shall enter upon such construction until it shall have been divided into sewerage districts and a plan adopted in the manner specified, and that the section shall not apply to cities already divided into sewerage districts which have adopted a sewerage system. Sec. 925—218 of subch. XX provides that the cost of all sewers in street and alley crossings and of all sewers in excess of $2 per linear foot chargeable to lots and lands as provided in sec. 925—216, of all catch-basins receiving water from gutters and of the overflow pipes connecting them with sewers, of all temporary catch-basins, of repairing and cleansing of sewers and all expenditures for temporary work necessary to carry on the system of sewerage, and all the cost of constructing sewers not provided for by special assessment, shall be paid for out of the fund of the proper sewerage district, and that "The cost of constructing the main sewers within the city limits or extending beyond the same may be paid for in whole or in part by the city out of the general fund or out of the funds of the proper sewerage district, or by abutting property owners, as the council shall by ordinance direct." Sec. 925—215 provides that "Such contract may, at the option of the city, except as herein otherwise provided, require the contractor to receive as payment for so much of the work as has been assessed against the lots opposite to the front of which any such sewer shall extend, certifi-

cates against such lots respectively, or improvement bonds, and the residue of such contract shall be paid out of the proceeds of the general sewerage tax to be levied on the real estate and personal property within the sewerage district by the council on the recommendation of the board of public works." Sec. 925—216 provides that "After any contract for work under this subchapter, to be paid for in whole or in part by such assessment, shall have been entered into, the board of public works . . . shall make an assessment against all lots . . . fronting or abutting on the work so contracted to be done. . . ."

These provisions clearly recognize that different methods may be followed at the same time and are inconsistent with the option theory contended for by appellant, since it is provided that the expense of sewers not assessed against adjoining lots must be paid out of the sewerage district fund, except the cost of main sewers, and all main sewers also unless the council provides for payment of main sewers in whole or in part by the city or by the owners of the abutting lots.

Sec. 925—216 as amended (Laws of 1901, ch. 215, sec. 1: Supp. 1906) provides that not more than $2 per linear foot of frontage shall be assessed against any lot; and sec. 925—218, Stats. (1898), provides that the cost of all sewers in street and alley crossings and the excess of $2 per linear foot, catch-basins, and construction of sewers not provided for by special assessment shall be paid out of the fund of the proper sewerage district; also provides that the cost of constructing main sewers within the city or extending beyond may be paid in whole or in part by the city out of the general fund or out of the funds of the proper sewerage district, or by abutting property. Secs. 925—231, 925—232, and 925—233 provide for the filing of plans of sewerage for the several districts, and provide that such plans may be changed from time to time as occasion or the exigencies may demand, and that when changes have been determined upon, if such changes render useless any existing sewers the expense of such change

shall be paid out of the general fund. Sec. 925—239 provides that in case the council shall decide to amend its system or adopt a new one it may proceed in the mode prescribed "in this subchapter or by the law in pursuance of which such sewer or sewers were constructed, . . . or in the discretion of the council it may cause the whole cost of such construction, alteration or change to be borne by the city, or to cause such portion of the estimated cost of construction, alteration or change of sewers as it shall designate to be borne by the city and the balance to be assessed upon the lots or parcels of land which may be benefited. . . ."

We are convinced that the contention of the appellant on the option theory is not tenable, and that subch. XX, upon its adoption by the defendant city, became a part of the city's charter and all provisions of it continued in full force; and that the adoption of one method of construction and maintaining sewers in no way abrogated the right of the city to avail itself of any other method or of any provision of the subchapter adopted.

It is argued by counsel for appellant that if the option theory which they contend for cannot be sustained the law is unconstitutional, because it imposes an unjust burden upon the appellant in that it paid for sewers under the district system as provided by ordinance No. 277, which imposed the burden on appellant of paying for "main and other sewers," and to compel it to pay for mains under another method would be imposing an unjust and inequitable burden and amount to double taxation, thereby destroying the rule of uniformity in taxation, and would be unjust discrimination and violative of sec. 1, art. VIII, of the constitution of the state of Wisconsin, which provides that the rule of taxation "shall be uniform." We do not regard it necessary to enter into any lengthy discussion upon the constitutionality of subch. XX. Obviously the various provisions relating to the different methods of payment as heretofore construed were designed by the legislature to aid in getting at as equitable a distribution

of the burden as might be, and it does not appear that the law violates any constitutional provision. Some inequity of burdens may result in special assessments under the most perfect law, and some injustice be done, but that is not sufficient to warrant the court in declaring a law unconstitutional. We think the contention is ruled against the appellant by this court in numerous cases, some of which we cite. *Weeks v. Milwaukee,* 10 Wis. 242; *Warner v. Knox,* 50 Wis. 429, 7 N. W. 372; *Blount v. Janesville,* 31 Wis. 648.

It is further insisted by counsel for appellant that there is no authority in law sufficient to warrant payment for any sewers or sewer work, other than for main sewers, out of the general fund, and that the tax is therefore illegal, since it was levied and extended upon the tax roll for the purpose of paying for sewers other than main sewers. This contention is based upon the report of the board of public works, referred to in the complaint, viz.:

"That the report of the said board of public works of the city of *Oconto* hereinbefore referred to and the estimates of the city engineer therein referred to embraced and included not only the construction of main sewers but also the construction of extensions and the rebuilding of branch sewers and the taking up of certain main sewers in the city of *Oconto* and the relaying of the same with larger and different sewers, as will appear from the said report of the board of public works and from the estimates of the city engineer referred to therein and on file with the city clerk of the city of *Oconto,* and that the said city of *Oconto* adopted the said report of the board of public works and the estimates of the said city engineer, and levied the tax in accordance therewith, as hereinbefore alleged."

It is further alleged in the complaint that the sum of $4,014.40 was assessed and levied on the taxable property in the defendant city, including the property of the plaintiff, and was extended on the tax roll and formed and constituted a part of the so-called "contingent fund," which fund amounts to $14,906.30. Now this point turns upon the proper con-

struction of the allegations of the complaint above quoted. It is argued that the plaintiff alleges that the tax levied is not for main sewers but includes other expenditures. It is flatly alleged in the complaint that $4,014.40 is assessed for main sewers. But it is further alleged that the report of the board of public works, which was adopted, includes extensions and the rebuilding of branch sewers and the taking up of certain main sewers and relaying the same with larger and different sewers. There is no positive allegation that any sum other than the $4,014.40 was spread upon the tax roll or became a cloud upon plaintiff's property. Nor does the allegation that money was included in the contingent fund reported for levy by the board of public works show that it was for payment of sewers other than main sewers and the rebuilding of branch sewers. The extensions referred to in the report were doubtless extensions of main sewers. At least the allegations of the complaint are capable of the construction that nothing was included in the report as a tax against plaintiff's property except taxes for payment of such sewers. Clearly it does not appear that any sum not chargeable to the general fund was assessed and levied upon the taxable property of the city, including the property of the plaintiff.

It is further insisted that since the passage of ordinance No. 318 the defendant city is without authority for the payment of any except main sewers. There is no allegation in the complaint to the effect that no ordinance exists authorizing the city to proceed with a sewer system. Conceding that ordinance No. 277 was repealed by ordinance No. 318, it does not appear that other ordinances did not exist granting the authority, nor even that ordinance No. 318 did not give such authority.

We conclude that the complaint states no cause of action, and that the order sustaining the demurrer was right and should be affirmed.

By the Court.—The order appealed from is affirmed.

MINAHAN, Appellant, vs. MINAHAN, Respondent.
SAME, Respondent, vs. SAME, Appellant.

February 23—March 14, 1911.

Divorce: Division of property: Discretion.

Where a divorce was granted to the wife on the ground of cruel and inhuman treatment, and the husband was found to be worth $100,000 over and above his debts and to have an income from his profession of $8,000 per year, a final division of the property awarding to the wife $23,000, together with the household furniture, is *held*, upon appeals by both parties, to have been, under all the circumstances (more fully stated in the opinion), a proper exercise of judicial discretion.

APPEALS from a judgment of the circuit court for Brown county: WARREN D. TARRANT, Judge. *Affirmed on both appeals.*

The plaintiff and defendant were married in November, 1899. In October, 1909, the plaintiff commenced an action for divorce on the ground of cruel and inhuman treatment. The defendant counterclaimed, alleging cruel and inhuman treatment and asking for a separate maintenance. Thereafter the parties entered into a stipulation whereby it was provided that the plaintiff should withdraw his complaint and also his reply to defendant's counterclaim, and that plaintiff upon the trial should make no attempt to prove the allegations contained in either said complaint or reply, and that if upon the proof offered by the defendant under the allegations of the said counterclaim the court was of the opinion that the defendant was entitled to a divorce, the defendant should ask for an absolute divorce, and that if such divorce were granted the defendant should be awarded the care, custody, and education of the two children of the parties, subject to certain conditions, reserving to the plaintiff the right to see and visit the children at such times as might be deemed reasonable by the court, and providing further for the religious education of

such children, and their medical care and attention by the plaintiff. It was further provided that except as to the issues and things stipulated and agreed the questions and issues involved should remain open for litigation upon the trial, and that the stipulation should be of no force or effect unless an absolute divorce were granted.

The court found that the defendant was entitled to a judgment for divorce on her counterclaim. Also that plaintiff was reasonably worth the sum of $100,000 over and above his debts and liabilities, and that in addition thereto his reasonable income from his profession was $8,000, and further that the plaintiff's personal debts amounted to $55,000 and that the indebtedness of the Minahan Building Company amounted to $35,000. It appeared from the testimony that the Minahan Building Company was a corporation having a capital stock of $150,000 and that the plaintiff was the owner and holder of stock in such corporation to the amount of $137,000.

The judgment awarded the care and custody of the two children of the parties to the defendant and also the sum of $30 per month for their support and maintenance, and contained various provisions relating to them. It further recited that of the temporary alimony awarded to the defendant $750 remained unpaid and that the defendant incurred in disbursements in the litigation $343.75, and adjudged that the plaintiff pay said sums to the defendant, together with attorneys' fees amounting to $1,000 in the aggregate, $150 of which amount had been paid, making the total allowance on account of unpaid alimony, disbursements, and counsel fees provided for in the judgment $1,943.75.

As and for a final division of property between the parties it was adjudged that the plaintiff should pay to the defendant the sum of $23,000, $8,000 of which was to be paid within thirty days from the date of the entry of the judgment and $5,000 yearly thereafter, with interest at five per cent. The defendant was likewise awarded all of the household furni-

ture and furnishings, with the exception of some designated articles which it was adjudged the plaintiff should retain. The judgment was made a lien on all the property of the defendant. Both parties appeal from the judgment.

For the plaintiff there were briefs by *Minahan & Minahan* and *Henry J. Killilea,* and oral argument by *V. I. Minahan.*

For the defendant there was a brief by *Martin, Martin & Martin,* and oral argument by *P. H. Martin.*

BARNES, J. On the defendant's appeal it is vigorously contended that the court erred in not finding that the plaintiff was worth at least $125,000 at the time of the trial and in refusing to find that his net income from his practice as a physician and surgeon and from other sources amounted to $18,000 per year, and that the award made to the defendant was grossly inadequate even if the findings made by the trial court as to the net worth of the plaintiff and as to his income from his profession had sufficient support in the testimony. On the part of the plaintiff it is urged with scarcely less strenuosity that the court was in error in finding that the plaintiff was worth to exceed the sum of $51,000 and in awarding to the defendant so large a share of the plaintiff's estate as was given to her. The controversy seems to have engendered more than the usual amount of feeling and bitterness found in such cases, and the zeal displayed in presenting the case indicated that such feeling had extended to some extent to the attorneys in the case as well as to the litigants. In view of the conclusion arrived at, it is not the custom of this court to make a critical analysis of the testimony or even an elaborate recital of it.

The plaintiff testified that when he was married in 1899 he was worth from $112,000 to $120,000, the greater portion of which was invested in interest-bearing securities which brought him an income of about $5,000 a year. His income from his practice was a matter of dispute, but concededly

amounted to $8,000 a year. Assuming that his stock in the Minahan Building Company was worth par at the time of the trial, the evidence of the plaintiff tended to show that his net worth in 1910 did not vary much from what it was eleven years before, and this the defendant contends must be untrue because the plaintiff met with no serious losses in the meantime and wholly failed to account for an annual outlay for living and other expenses more than sufficient to use up his income. Because of such failure it is urged that plaintiff did not make a full disclosure of his property.

The court did not make any specific findings by which we are advised as to just how the net worth of the plaintiff was arrived at. The Minahan Building Company was incorporated in 1906 and was empowered by its articles of incorporation to deal in real estate, to erect and rent buildings, and to furnish and sell light, heat, and water. It secured a franchise from the city of Green Bay to furnish electricity, water, and air in an area covering about fifteen blocks. Litigation is now pending in which the validity of this franchise is attacked. It purchased a building site well located for $24,000, and during 1907 and 1908 erected thereon a modern six-story office and store building of concrete reinforced with steel. The entire cost of the building and site and lighting plant, as shown by the books of the corporation, was $186,975.88, and there is some evidence tending to show that some moneys were advanced before the books of the corporation were opened and which are not entered on such books. The lighting plant was located in the basement of the building, and the investment therein and in erecting poles and stringing wires and doing such other things as might be necessary to render the plant serviceable was about $47,000. The building appears to have been ready for occupancy about July 1, 1908. Sixty-seven per cent. of its space was occupied at the time of the trial and the electric plant was used to the extent of about one third of its capacity. For the twenty-two

months from July 1, 1908, to May 1, 1910, the income from the building and the lighting plant exceeded the operating expenses by approximately $4,000. The testimony shows that a systematic attempt had been made to secure tenants and that the prospects of renting any considerable part of the vacant space in the near future are not very encouraging.

It is apparent from the foregoing that the value of the plaintiff's stock in the Minahan Building Company is to a large extent a matter of speculation. Whether such a building in a city the size of Green Bay will soon become a paying investment is problematical. To make the venture a paying one it is not only necessary to secure tenants but also to secure rentals commensurate with the cost of the space leased, and it is somewhat significant that after the lapse of nearly two years about one third of the building remains vacant. Reasonable minds might differ materially as to the value of the stock in this corporation at the time of the trial. If we agreed with defendant's counsel that the professional income of the plaintiff since 1899 was larger than he admitted and that his expenses were less than he claimed, we would still be unable to reach the conclusion that the finding of the trial court should be set aside. We think in any view of the case the amount found by the trial court is high enough and that the finding should not be disturbed on the appeal of either party. No direct testimony was offered as to the value of this stock. If there had been, it is not unlikely that honest witnesses would be wide apart on the subject. The facts from which a witness would naturally draw a conclusion were before the court and were no doubt considered by it, and we think the court drew a very fair conclusion from the whole evidence.

The finding of the court that the professional income of the plaintiff was $8,000 per year at the time of the trial has ample support in the testimony and should not be disturbed.

It is next urged by the defendant that the trial court has

found on sufficient evidence that the plaintiff habitually treated his wife in a cruel and inhuman manner during their married life; that the court has found her blameless; and that in view of these facts and of the further fact that the plaintiff's earning capacity is large, the division of property made was manifestly unfair and unjust to the defendant. In this connection it is argued that the wife was equitably entitled to one half of the husband's property and that in no event should the award have been less than one third, and a number of cases are cited in support of such a division. What is a fair division of property depends largely on the facts of each individual case. Former precedents are valuable guides when they rest on facts substantially similar to those existing in the case under consideration, but it seldom happens that a similarity in material facts is met with. It appears in the instant case that the plaintiff has to exceed $137,000 invested in the Minahan Building Company, which, at the present time at least, is bringing in but a very small income. The court found, and the finding has ample support in the testimony, that the personal indebtedness of the plaintiff amounted to $55,500 and that the indebtedness of the building company amounted to about $35,000. The plaintiff's share of this indebtedness would be substantially $32,000, and the interest on these sums would amount to about $5,000 per annum. The plaintiff is carrying life insurance upon which the annual premiums amount to $2,970, and he must either continue to pay these premiums for a considerable period of time or suffer any loss that may result from permitting the policies to lapse. His life insurance and nearly all of his stock in the building company are pledged as collateral security for the payment of his indebtedness, and his homestead is mortgaged. Some of his creditors are insisting on their loans being paid. If he has made a true disclosure of the property which he owns, nearly everything which he has is hypothecated to secure his creditors. It is true that his equity in this property amounts

to a large sum, but it is none the less true that the circumstances of the plaintiff are very different from what they would be were he possessed of convertible property of the value of $100,000 without any indebtedness. A man owning property of the value of $187,000, with an indebtedness of $87,000, is by no means as well off as a man worth $100,000 with no indebtedness, particularly where it is apparent that the property is not presently productive of much income and where it is a matter of conjecture when it will be. It further appears from the testimony on both sides that the plaintiff has arterial sclerosis, an incurable disease, which in a measure prevents him from performing dangerous or delicate operations and which may very materially affect his future earning capacity, particularly if his present business partnership were terminated. It likewise appears that plaintiff amassed his fortune before his marriage with the defendant and that she has an independent fortune of her own amounting to $12,000. In addition to the $23,000 awarded to the defendant she receives practically all of the household furniture and contents, the value of which is not found, and the plaintiff is required to pay the defendant $1,943.75 for attorneys' fees, costs of suit, and arrearage in alimony. To require the payment of any larger sum might well result in compelling the plaintiff to sacrifice his property. The trial court was charged with the duty of exercising proper judicial discretion in making a division of property and its decision will not be disturbed unless it is manifestly unjust. *Hooper v. Hooper,* 102 Wis. 598, 600, 78 N. W. 753. In our opinion that discretion was wisely exercised in the case before us.

We are not unmindful of the plea of the plaintiff's counsel that the award is unjust and excessive and will work undue hardship upon his client. Plaintiff may be placed in an embarrassing situation by the judgment in the case, but as far as the record discloses he alone is responsible for the position in which he finds himself, and we are unable to reach the con-

clusion that the award is excessive. The defendant lived with the plaintiff for nearly ten years. During this time she bore him two children and acted the part of a faithful wife, and during nearly all of the time she was subjected to cruelties and indignities at his hands which stopped short of physical violence, but which were better calculated to hurt and to wound than the scourge or the knout. What the record might disclose had the plaintiff elected to defend his wife's cause of action on the merits does not concern us. He permitted the record to be made up, and we must assume it to be a verity and the plaintiff must abide by it.

By the Court.—The judgment appealed from is affirmed on both appeals.

HERRING, Respondent, vs. E. I. DU PONT DE NEMOURS POWDER COMPANY, Appellant.

February 23—March 14, 1911.

New trial: Discretion: Presumption: Appeal from order: Dismissal.

1. A new trial granted without specifying any reason therefor, but upon condition of the payment of the costs of trial, will be presumed to have been granted in the discretion of the court because it was dissatisfied with the verdict.
2. An appeal from a discretionary order will be dismissed if there was no abuse of discretion.

APPEAL from an order of the circuit court for Bayfield county: E. W. HELMS, Judge. *Dismissed.*

For the appellant there was a brief by *J. P. Laffey* and *A. W. McLeod,* and oral argument by *Mr. McLeod.*

For the respondent there was a brief by *E. C. Alvord* and *Sanborn, Lamoreux & Pray,* and oral argument by *A. W. Sanborn.*

WINSLOW, C. J. This case was once here on an appeal from a judgment of nonsuit (139 Wis. 412, 121 N. W. 170), and it was held upon that appeal that the nonsuit was wrongly granted and a new trial was ordered. A new trial has been had and a special verdict rendered, consisting of eight questions and answers which it is unnecessary to set forth. The defendant moved to change the answers to certain of the questions, for judgment on the verdict, and for judgment notwithstanding the verdict. The plaintiff moved to change the answers to certain of the questions, and in default thereof to set aside the verdict and grant a new trial, because the verdict is contrary to law and not supported by the evidence and because of inconsistency in the answers in the special verdict. The defendant's motions were all denied, and the plaintiff's motion to change the answers was denied, but the plaintiff's motion to set aside the verdict and for a new trial was granted on condition that the plaintiff pay the costs of the trial. From this order the defendant appeals.

The new trial having been granted upon condition of the payment of the costs of the trial and specifying no reason therefor must be presumed to have been granted in the exercise of the discretion of the court, because for some reason it was dissatisfied with the verdict and deemed that the ends of justice would be best subserved by a new trial. *Giese v. Milwaukee E. R. & L. Co.* 116 Wis. 66, 92 N. W. 356; *Frost v. Meyer,* 137 Wis. 255, 118 N. W. 811. No abuse of discretion is claimed, nor does it appear that any such claim could be successfully made. Under such circumstances the rule is well settled that the appeal must be dismissed. *Sly v. Kilbourn City,* 144 Wis. 203, 128 N. W. 872.

By the Court.—It is so ordered.

STATE EX REL. SCHAETZLE, Respondent, vs. KNOWLES and others, Trustees, Appellants.

February 23—March 14, 1911.

Municipal corporations: Firemen's pension fund: Statute construed.

1. Under sec. 959—46*n*, Stats. (Laws of 1907, ch. 214),—providing that any member of a fire department of a city of the second, third, or fourth class "having served twenty-two years or more in such department" shall, upon retirement or discharge, have a monthly pension "equal to one half of the monthly compensation allowed such member as salary at the date of his retirement" or discharge,—one who served during a part of the twenty-two years as a volunteer, not devoting his whole time to the service, is entitled to the pension if there is a monthly compensation incident to his service at the time of its termination.
2. *It seems* that the "monthly compensation allowed . . . as salary," by which the pension is to be measured, need not be in the form of a stated amount per month, but may be a specified sum per year, payable annually, quarterly, monthly, or otherwise.

APPEAL from an order of the circuit court for Ashland county: E. C. HIGBEE, Judge. *Affirmed.*

Mandamus action to compel the trustees of the firemen's pension fund of the city of Ashland, Wisconsin, to place the name of relator on the pension roll.

Facts were stated in the petition and alternative writ appropriate to the question of whether relator was eligible for a pension under ch. 214, Laws of 1907. It was stated that he became a member of the fire department in April, 1887; that he was made captain in 1893, assistant chief May, 1895, chief in 1897, and was discharged July 1, 1909, having been in continuous service over twenty-two years, with compensation of $52 per year at first, increased later by $1 per hour actually spent at fires, and later to $250 per year upon his being made assistant chief, further increased to $600 per year upon his being advanced to the position of chief, and later to $840 per year, and lastly to $1,000 per year. From the time he en-

tered the service to September, 1897, he devoted only a portion of his time thereto and the rest to his profession as a barber. Thereafter he devoted all his time to the public service as fireman. Upon the taking effect of ch. 214, Laws of 1907, the city council acted thereunder and continued to do so up to the time relator was discharged, he contributing his proportion of the pension fund. Such fund has never amounted to $50,000. There is no beneficiary thereof as yet. By reason of the facts stated relator is entitled to receive from such fund since the time of his discharge $41.66 per month, or one half the monthly wages he was then receiving, so far as such fund will go for that purpose. He applied for such payment but the trustees refused to pass favorably on his application.

An alternative writ was issued to coerce the trustees into granting relator's application. The trustees appeared and moved to quash the proceedings for insufficiency of facts to warrant the relief sought. The motion of respondents in such proceedings and their demurrer to the petition were overruled.

The cause was submitted for the appellants on the brief of *W. S. Cate,* and for the respondent on that of *Sanborn, Lamoreux & Pray.*

MARSHALL, J. The appeal presents the question of whether, under ch. 214, Laws of 1907, as to a fireman who had been in service before the act, part of the time as a volunteer; one not required to spend time in the service so as to preclude him from giving his attention in part to private affairs and not drawing a monthly salary, as in case of members of paid fire departments in many cases, the period covered by the mixed vocation is countable in making up the twenty-two years requisite to eligibility for a pension. The law is as follows:

"Any member of the fire department of any such city, having served twenty-two years or more in such department, may

make application to said board to be retired from such department, or he may be retired by the said board of its own motion; in either which case said board shall order and direct that such member shall be paid a monthly pension of a sum equal to one half of the monthly compensation allowed such member as salary at the date of his retirement, or if any member shall be discharged after serving twenty-two years or more, the said board shall order or direct that such person shall be paid a monthly pension equal to one half the monthly compensation allowed to such member as salary at the date of his discharge." [Sec. 959—46*n*, Stats.]

We are unable to see any legitimate ground for reading the foregoing as if the words—who has received a monthly salary during the whole of such time and devoted his whole time to the service—or words of similar import were in place by implication after the words "in such department" so as to exclude service under the conditions which characterized that of respondent during his early connection with the fire department. There is no rule of judicial interpretation which would justify or even suggest taking such liberty with the statute as we look at the matter. "Any member of the fire department of any such city, having served twenty-two years or more in such department," does not seem to have any qualification as to whether the department is on a salary basis, or volunteer basis, part of the time. The call is for a fire department—an organization in the ordinary way as part of the municipal machinery—membership therein, service for the period of at least twenty-two years, and a monthly compensation incident to the service at the time of its termination.

It is by no means clear that the monthly salary feature requires the compensation to be awarded in form as a stated amount per month, instead of a specified sum per year, payable annually, quarterly, monthly, or otherwise. That feature of the law seems to be to the effect that the compensation of the ex-officer shall be one half as much per month as he re-

ceived as an equivalent for his service covering such a period at the termination of his connection with the department.

The foregoing accords with the decision complained of.

By the Court.—The order is affirmed.

MILLER and another, Respondents, vs. RYDER, Appellant.

February 23—March 14, 1911.

Interest: Account stated: Waiver of agreement.

Plaintiffs' oral agreement that if defendant would continue to buy goods of them no interest would be charged on his account was waived by defendant's subsequent conduct during four years in receiving and acquiescing in statements of account in which interest was charged, and in making payments on account without protest after knowledge that his remittances were being credited on the amount of principal and interest and the balance carried forward as an item into the next statement.

APPEAL from a judgment of the circuit court for Bayfield county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

The cause was submitted for the appellant on the brief of *E. C. Alvord,* attorney, and *Horace B. Walmsley,* of counsel, and for the respondents on that of *Richmond, Jackman & Swansen.*

TIMLIN, J. The court directed a verdict for the plaintiffs, and the appellant insists this was error because there was evidence to take the case to the jury. In a course of dealing between plaintiffs and defendant which began about December, 1900, and ended January 2, 1907, it appeared that defendant on September 18, 1902, met one of the plaintiffs in Chicago and informed him that he would not buy any more goods from the plaintiffs, who were engaged in the manufacture and sale of clothing, because they charged him interest

on his account. An agreement was then made that if the defendant would continue to buy goods of the plaintiffs no interest would be charged. The defendant continued purchases of clothing from the plaintiffs, and the plaintiffs sent bills or invoices containing a printed statement that interest would be charged after a certain date, and also sent about ten different statements of account, in each of which interest was charged. The interest so charged was added to the sum of the items of the bill. Remittances made by defendant were credited on the amount of principal and interest and the remainder carried forward as an item into the next statement. The defendant without objection made partial payments again, which were credited in the same way against the amount of principal and interest.

Defendant contends that he was not bound to notice these invoices or statements or make any objection thereunto, but might rely on his agreement, and the plaintiffs claim and the court below held that the receipt of and acquiescence in these statements of account, and payments made without protest after knowledge that payments had been so applied as aforesaid (and hence that future payments would be so applied), constituted a waiver of the agreement testified to by the defendant, and directed the verdict as said. This course of dealing, having continued for more than four years after the making of the alleged oral agreement, must be construed to be a waiver of that agreement by subsequent conduct and consent within the rule of *Ripley v. Sage L. & I. Co.* 138 Wis. 304, 119 N. W. 108; *Rose v. Bradley,* 91 Wis. 619, 65 N. W. 509; *Jones v. De Muth,* 137 Wis. 120, 118 N. W. 542; *Segelke & K. Mfg. Co. v. Vincent,* 135 Wis. 237, 115 N. W. 806.

By the Court.—Judgment affirmed.

KNAPP, Respondent, vs. ALEXANDER-EDGAR LUMBER COMPANY, Appellant.

February 23—March 14, 1911.

Trespass upon land: Who may sue: Constructive possession follows title: Wrongful cutting of timber: Single cause of action: Homestead entry: When title is acquired: Settlement for trespass with U. S.: Patent: Doctrine of relation.

1. Where the plaintiff in an action for trespass upon land was not in actual possession but relies on constructive possession, he must establish such possession by showing that he had good title.
2. A trespasser on unoccupied land can be made to respond in damages but once, and then to the owner.
3. Sec. 4269, Stats. (1898), does not give more than one right of action for a single injury to the freehold.
4. An entryman under the homestead law acquires no title to the land until he has complied with the law and has earned his patent.
5. If, before the homesteader has taken possession and while his right to the land is still inchoate, a trespass is committed thereon, the sole right of action is in the United States as owner.
6. Such right of action is extinguished by a settlement made by the trespasser with the United States, and is not revived by subsequent issuance of the patent to the homesteader.
7. The equitable doctrine of relation cannot be applied to such a case for the purpose of compelling the trespasser to pay twice for the same wrong. If it has any application, it operates merely to charge the government as trustee of the patentee for the amount collected for the trespass.

APPEAL from a judgment of the circuit court for Bayfield county: JOHN K. PARISH, Circuit Judge. *Reversed.*

This is an action brought to recover damages for a trespass committed on the homestead of the plaintiff. On February 20, 1902, pursuant to sec. 2289, R. S. of U. S., plaintiff made application for a homestead entry on the land upon which the trespass was afterwards committed. The register of the land office attached a certificate to such application, re-

citing that the application was made for lands subject to entry under the homestead act and that there was no prior adverse right to the same. At the time of making his application plaintiff also filed an affidavit showing that he was entitled to make a homestead entry under the laws of the United States. On February 21st the receiver of the land office acknowledged receipt of the sum of $18, being the amount of fee compensation to which the register and receiver were entitled on the entry. On February 26, 1902, plaintiff filed the non-saline affidavit required by law. The foregoing papers constituted the homestead entry of the plaintiff in the lands described in the application. The trespass was committed on and between March 20, 1902, and April 7th of the same year, the defendant cutting and removing from said lands 49,140 feet of pine saw logs. On July 1, 1902, the plaintiff established his residence on said land and continued to reside thereon for five years and made his final proofs in August, 1907, when a final receiver's receipt was issued to him. This was followed by a patent which was issued in January, 1908. Plaintiff looked the land over once before making his entry, for the purpose of informing himself as to its value. On March 20th he went upon the land to see if any trespass had been committed thereon, and on April 5th went upon the land for the same purpose and found the defendant cutting timber and forbade its cutting any more. On July 13, 1903, the United States collected from the defendant the value of the logs cut and removed from the plaintiff's homestead, the amount collected being $320.14. After receiving his patent the plaintiff commenced this action and recovered judgment for the value of the lumber cut from the logs removed from the plaintiff's homestead, the amount recovered being $714.87. Defendant appeals from such judgment.

For the appellant there were briefs by *Kreutzer, Bird, Rosenberry & Okoneski,* and oral argument by *M. B. Rosenberry.*

For the respondent there was a brief by *Grace & Hudnall,* and oral argument by *Geo. B. Hudnall.*

BARNES, J. That the plaintiff at the time of the cutting was not in the actual possession of the land from which the timber sued for was cut, is too plain to admit of controversy. *Mygatt v. Coe,* 147 N. Y. 456, 42 N. E. 17; *Rice v. Frayser,* 24 Fed. 460; *Staton v. Mullis,* 92 N. C. 623; *Travers v. McElvain,* 181 Ill. 382, 387, 55 N. E. 135; *Webber v. Clarke,* 74 Cal. 11, 15, 15 Pac. 431; *Omaha & F. L. & T. Co. v. Parker,* 33 Neb. 775, 51 N. W. 139; *Gildehaus v. Whiting,* 39 Kan. 706, 713, 18 Pac. 916. The action of trespass *quare clausum* can be maintained only by one in the actual or constructive possession of the premises on which the trespass is committed. *Gunsolus v. Lormer,* 54 Wis. 630, 634, 12 N. W. 62.

That a cause of action for trespass for injury to the possessory right may be maintained by a person in the actual possession of land against another who holds no paramount right or title, or against a mere intruder, by proving such possession, unlawful entry, and damage, is well established by the decided cases in this court. *Hungerford v. Redford,* 29 Wis. 345, 348; *McNarra v. C. & N. W. R. Co.* 41 Wis. 69, 74; *Gerhardt v. Swaty,* 57 Wis. 24, 28, 14 N. W. 851; *Gunsolus v. Lormer, supra.*

It is also well settled that a plaintiff in an action *quare clausum* who is not in the actual possession of the land upon which the trespass is committed, and who is therefore obliged to rely on constructive possession, must establish that possession by showing that he has good title. Stated in another way, the constructive possession follows the title. In *Hungerford v. Redford, supra,* the court, after saying that actual possession is sufficient unless the defendant proves an adverse title of a higher character than a possessory one, continues:

"If the plaintiff is not the real owner of the land, and the defendants shall be compelled to pay the judgment which he

[the plaintiff] recovered against them in the circuit court, what rule of law will prevent such owner from bringing an action against them for the same logs and recovering therein? . . . The fact that a recovery by the holder of a merely colorable title is no bar to a recovery by the real owner, demonstrates that none but the real owner can recover."

The action was one of replevin to recover logs wrongfully cut on unoccupied lands claimed by the plaintiff, and recovery was denied because he was unable to prove perfect title to the lands.

McNarra v. C. & N. W. R. Co., supra, was an action to recover damages occasioned by a fire negligently set by the defendant. It was held that the title necessary to be proved in order to maintain the action was the same as in an action of trespass *quare clausum fregit* or in replevin for timber cut and removed, and that "in either case, if the lands upon which the trespass was committed were vacant and unoccupied, the plaintiff must prove his title thereto, or he cannot recover."

In *Gunsolus v. Lormer, supra,* it was said: "That constructive possession which, in the absence of any actual possession, will warrant the bringing of this action [trespass *quare clausum*], is that of the owner of the premises alone."

In *Stephenson v. Wilson,* 37 Wis. 482, 488, it was held that if the plaintiff in an action of trespass *quare clausum* cannot show actual possession, but is obliged to rely on his legal title, he must show a valid title.

In *Wadleigh v. Marathon Co. Bank,* 58 Wis. 546, 17 N. W. 314, the action was brought to recover the value of saw logs cut upon lands owned by the plaintiff and converted by the defendant to its use. Judgment was demanded for $1,000, being the value of the logs, and for the sum of $1,000 for the damage to the land caused by the cutting of the timber. It was held that the action was in the nature of a trespass and was also brought to recover damages for permanent injury to the freehold. The court said:

"Were no damages claimed other than for the mere invasion of plaintiff's possession, the lands being wild and vacant,

it would be incumbent on him to prove his title thereto in order to show a constructive possession in himself. The cause of action being permanent injury to the land, to entitle the plaintiff to recover he must establish his title. The reason of this is, if the plaintiff is not the owner of the land, a recovery by him would be no bar to an action for such injury brought against the trespasser by the real owner."

Paige v. Kolman, 93 Wis. 435, 436, 67 N. W. 700, was an action for trespass for cutting timber. The court said: "The land upon which the trespass was committed was unoccupied timber land. Hence the plaintiff must prove valid title in order to recover."

In some of the cases cited the defendants were mere naked trespassers who acted without any color of right. In all of them the plaintiffs showed or attempted to show some color of title. It seems, therefore, to be quite well established by our decisions that constructive possession follows the title, and that the trespasser on unoccupied lands can be made to respond in damages but once, and then to the owner. The decisions elsewhere to the same effect are numerous: *Shipman v. Baxter,* 21 Ala. 456; *Smith v. Yell,* 8 Ark. (3 Eng.) 470; *Jenkins v. Lykes,* 19 Fla. 148; *Yahoola River & C. C. H. H. M. Co. v. Irby,* 40 Ga. 479; *Atlantic & G. R. Co. v. Fuller,* 48 Ga. 423; *Rockwell v. Jones,* 21 Ill. 279; *Gauche v. Mayer,* 27 Ill. 134; *Broker v. Scobey,* 56 Ind. 588; *Aikin v. Buck,* 1 Wend. 466; *Roe v. Wilbur,* 57 Pa. St. 406; *Snider v. Myers,* 3 W. Va. 195; *Church v. Meeker,* 34 Conn. 421; *Edwards v. Noyes,* 65 N. Y. 125.

It is now pertinent to consider what interest the plaintiff had acquired in the lands at the time of the trespass. It has been held by this court and by the federal supreme court that an entryman secures no title to the land he desires to homestead until he has complied with the law and has earned his patent. *Empey v. Plugert,* 64 Wis. 603, 607, 608, 25 N. W. 560; *Whitcomb v. Provost,* 102 Wis. 278, 282, 283, 78 N.

W. 432; *Shiver v. U. S.* 159 U. S. 491, 16 Sup. Ct. 54; *Stone v. U. S.* 167 U. S. 178, 17 Sup. Ct. 778. If the homesteader, before he has earned and received a final receiver's receipt, cuts or removes any more timber from his homestead than is necessary in the process of clearing his farm and fitting it for cultivation, he himself becomes a trespasser and liable to be prosecuted not only civilly but criminally for the trespass. *Timber Cases,* 11 Fed. 81; *U. S. v. Lane,* 19 Fed. 910; *U. S. v. Freyberg,* 32 Fed. 195; *Shiver v. U. S., supra; Stone v. U. S., supra.* No vested right is conferred on the claimant that may not be taken away by Congress. *Frisbie v. Whitney,* 9 Wall. 187, 193; *Yosemite Valley Case,* 15 Wall. 77, 88; *Shiver v. U. S., supra.* The homesteader on making his entry acquires an inchoate right to secure the title to the land filed on, on complying with the homestead law, in preference to all other applicants for such land whose claims are subsequent to his. The land thereby becomes segregated and set apart for his benefit, and, in a sense, appropriated for his use. *Shiver v. U. S., supra; Burlington, K. & S. W. R. Co. v. Johnson,* 38 Kan. 142, 16 Pac. 125, 129, and cases cited.

There was a right of action in some one to recover damages for this trespass as soon as it was committed. It is clear that such a right of action was vested in the United States as owner of the lands. It also seems clear that under the facts of this case there was but a single cause of action, and that the plaintiff had no title that carried the constructive possession so as to enable him to maintain the action. If there was but a single cause of action, that was extinguished by the settlement made with the only party who was entitled to make it.

The plaintiff, however, maintains that the doctrine of relation is applicable to the facts of the case, and that the patent should be held to relate back and convey title as of the date of the homestead filing, and a number of cases are cited in support of such claim.

The doctrine of relation is of equitable origin, but has a well recognized application to proceedings at law. It is applied most frequently to conveyances of real estate made in pursuance of an antecedent contract, and is applied to give effect to the intention of the parties or to protect purchasers pending the fulfilment of the contract. It is also applied to public land transactions so as to cut off intervening claimants between the date of the entry and the date of the patent. *Shipley v. Cowan,* 91 U. S. 330, 337, 340; *Peyton v. Desmond,* 129 Fed. 1, 11. Our own court has applied it to land contracts, at least as between parties and privies thereto, in the following cases: *Stahl v. Lynn,* 86 Wis. 75, 56 N. W. 188; *Krakow v. Wille,* 125 Wis. 284, 103 N. W. 1121; *Evans v. Crawford Co. F. M. F. Ins. Co.* 130 Wis. 189, 109 N. W. 952; *Western L. & C. Co. v. Copper River L. Co.* 138 Wis. 404, 120 N. W. 277; and *Blaha v. Borgman,* 142 Wis. 43, 124 N. W. 1047. It has also held that the doctrine would apply as against a trespasser. *Gilbert v. Auster,* 135 Wis. 581, 116 N. W. 177.

In *Peyton v. Desmond,* 129 Fed. 1, it is held that a homesteader after he secures a patent may sue and recover for a trespass committed before final proofs were made, the patent relating back to the date of entry. In this case it is held that the homesteader is entitled to receive the land in the condition in which it was on the date he made his entry. When the patent was issued, however, the timber was gone and a right of action only remained to recover its value. Equitably, as between the United States and the homesteader, that cause of action became the property of the latter as soon as he complied with the law, and it was held that the patent carried with it the right of action for the trespass. No attempt had been made by the United States to enforce the collection of the trespass. This case, which is strongly relied on by the respondent, is authority to the proposition that the moneys collected by the United States from the defendant equitably

and justly belong to the plaintiff, now that he has perfected his title. It is not authority for the claim that the United States did not have the right to collect for the trespass in the first instance, and neither is it authority to the proposition that, although the United States has compromised and settled its cause of action, the same cause of action can be prosecuted by the homesteader against the trespasser. On the contrary, the decision holds that, where the United States has a cause of action at the time the patent is issued, it parts with such cause of action against the trespasser by assigning it, in effect, to the homesteader.

The case of *Carner v. C., St. P., M. & O. R. Co.* 43 Minn. 375, 45 N. W. 713, relied on by the appellant, is distinguishable from the case at bar in two respects. In the first place, the plaintiff was in the actual possession of the land under his timber entry when it was damaged by the fire negligently set by the defendant, and, secondly, the United States asserted no claim against the defendant for the damage resulting from the fire.

The case of *Hastay v. Bonness,* 84 Minn. 120, 86 N. W. 896, is also relied upon by the appellant. This action was brought by the homesteader after he had secured his patent, and the United States had never attempted to collect for the trespass, and it was held that the patent related back to the date of entry. This case was very similar in its facts to *Peyton v. Desmond, supra.*

Our attention has not been called to any case which holds that the United States was not entitled to collect for the trespass committed by the defendant at the time which it did collect for the same, and the law seems to be well settled the other way. Neither has our attention been called to any case where the homesteader who has not yet entered into possession of his homestead can maintain an action for trespass committed before he has taken possession and while his right to the land remains inchoate. This action is brought under

sec. 4269, Stats. (1898), and that statute only gives a right of action for trespass for timber wrongfully cut *"upon the land of the plaintiff."* The decisions of our own court hold that constructive possession follows the title in an action of trespass involving injury to the freehold. Finally, we think there was but a single cause of action, which the United States might enforce at any time before a final receiver's receipt or patent was issued, and that when it was enforced and the damages claimed were paid it became extinguished and the issuance of a patent could not revive it. The rule requiring a party not in actual possession to show title before he can recover in an action for trespass for injury to real estate, is reasonable. Our statute (sec. 4269) has been held to be highly penal, in that it permits the injured party to recover a sum which may be several times the amount of the damage actually sustained. Unless the law clearly permits every person having color of title to sue for and exact damages provided for in the statute, we should be loath to hold that there could be more than one recovery for a single injury to the freehold. Four persons may each have a tax deed on a vacant parcel of land on none of which deeds has the three-year statute of limitations run. Any one of the four may eventually acquire title by virtue of his deed and acts done thereunder. The original owner may succeed in setting aside all of the deeds and establish perfect title in himself. We do not think that each of these five parties could sue a trespasser and collect from him the value of the lumber manufactured from logs wrongfully cut from the land because each could show a colorable title and a better right to the premises than the trespasser. The equitable doctrine of relation cannot be applied simply to compel a wrongdoer to pay twice for the same wrong. If the doctrine of relation has any application in such a case as this, it is between the government and the homesteader, whereby the former, when the homestead is patented, should be charged as trustee of the latter for the

amount collected. It follows that the settlement of the cause of action sued on by the defendant with the United States was a good defense to such action and that the court erred in awarding judgment in plaintiff's favor.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded with directions to dismiss the complaint.

KERWIN, J., dissents.

WILLETTE, Appellant, vs. RHINELANDER PAPER COMPANY, Respondent.

February 24—March 14, 1911.

Master and servant: Injury from unguarded gearing: Statute construed: Liability not absolute: Duty of master: Negligence: Defenses: Contributory negligence: Questions for jury: Special verdict: Inconsistent findings: Appeal: Reversal: New trial, when ordered: Excessive damages: Remission of part.

1. Sec. 1636*j*, Stats. (1898), did not create a rule of absolute liability. It does not displace the common-law standard of care of the master or that of the servant; sec. 1636*jj*, Stats. (Supp. 1906: Laws of 1905, ch. 303), was enacted in view of sec. 1636*j* not increasing the care of the master in any of the particular cases beyond the standard of the great mass of mankind under the same or similar circumstances, nor abolishing the defense of contributory negligence, strictly so called, or the special form thereof denominated assumption of the risk.
2. In sec. 1636*jj* the legislature recognized the aforesaid meaning of sec. 1636*j* by characterizing failure to comply therewith as "negligent omission," etc., and recognized its adjudicated purpose as to contributory fault and assumption of the risk, by abolishing competency to establish the matter by a single named circumstance.
3. In respect to sec. 1636*j*, except in situations obviously dangerous, if an employer furnishes such a guard or fence as is in general use among employers of ordinary care under the same or simi-

lar circumstances, he has discharged his duty,—the dangerous machinery is securely guarded or fenced within the meaning of the statute,—in that, when all ordinary care to that end shall have been exercised by the master his statutory duty has been performed.

4. The statute leaves, primarily, the master to determine whether a situation needs guarding or fencing in contemplation thereof, and if so the means and manner of complying therewith, subject to the duty, which is absolute, to exercise all ordinary care in respect to the matter.

5. When a statute commands the doing of some act by one person for the personal safety of another, without prescribing any penalty for the benefit of the latter in case of his being injured by breach of such command, such breach is negligence *per se*, as matter of fact, of the grade of want of ordinary care with incidental liability, but rebuttable by proof to the contrary, the same as in ordinary cases of negligent injury, in the absence of express language to the contrary.

6. The language of sec. 1636*jj* abolishing contributory conduct of a claimant for compensation for an injury within the statute, extends only so far as otherwise acceptance of the danger would be provable by knowingly submitting thereto.

7. Failure to comply with sec. 1636*j* of the statutes in any situation, is not excusable because it is not practicable to so guard or fence as to render such situation reasonably safe for employees to discharge their duty in the exercise of ordinary care.

8. The effect of the statute is to prohibit the use of such machinery as is mentioned therein, unless by the exercise of ordinary care it can be rendered reasonably safe for employees in the discharge of their duty in the exercise of like care.

9. It appearing conclusively from the evidence—that an employee received a personal injury by coming in contact with machinery in the discharge of his duty, and the jury having found that such machinery was so located that the employer in the exercise of ordinary care ought reasonably to have apprehended some employee in the exercise of like care might be injured thereby, and that he failed to guard or fence the machinery in respect to such danger, and that the employee was not guilty of any want of ordinary care in respect to the matter—the employer is liable as matter of law.

10. In the circumstances stated in the foregoing a finding negativing that failure to comply with the statute was the proximate cause of the injury is inconsistent with the other findings and on motion should be changed.

11. In such circumstances a finding on the subject of proximate cause is nonessential since such element is shown as matter of law from the other facts.
12. In like circumstances if the negative answer is predicated merely on impracticability to guard or fence without the aid of some implement which was not furnished, then it is equivalent to an affirmative finding.
13. On reversal of a judgment the cause is to be remanded for a new trial only in case justice requires it, otherwise the court, in harmony with the spirit of the Code, will, if practicable, make such disposition of the case as to terminate the litigation.
14. The plaintiff, in an action where there has been a trial and an excessive verdict, may be permitted to take judgment for a less sum without consent of the defendant, without prejudicing the latter's right of a jury trial, if the optional amount be placed as low as any jury of fair men rightly instructed would within a reasonable probability place it.
15. In case of an injury to a man of forty-five years of age, depriving him of the first, second, and part of the third finger of the left hand, causing him the usual amount of pain in such cases, from which he recovered in the course of about two and one-half months so as to return to work at full wages, and without much loss of working capacity for one of his station and a common laborer without future prospects of change in that regard, capable at the best of earning $65 per month,—an award of $4,500 is clearly excessive.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Oneida county: A. H. REID, Circuit Judge. *Reversed.*

Action to recover damages for a personal injury. The following is a summary of the claimed facts upon which the relief was demanded: Plaintiff for some time before he was injured, as hereafter alleged, was employed by defendant as oiler. One machine he attended was a large electrically operated pump. There were two horizontal shafts in an iron frame resting on an iron base, the top of which base was about eight inches from the floor. The distance between the inner side of the journal boxes of the shafts was about two feet. One shaft was located on the front of the frame about six feet from the floor and the other was above and back of it in

the center of the frame about eight feet from the floor. Power was applied to a pulley on the lower shaft. On each end of that shaft was an eight-inch gear which meshed with and communicated power to forty-five-inch gears on the upper shaft. There were two pitmans, one on each large gear connected therewith by a wrist pin and connected at the lower end with a pump plunger. In operation, the large gears made about forty-five revolutions per minute. The bearings on the shafts and the wrist pins needed frequent attention by the oiler. The gears on the upper shaft were wholly unguarded or fenced. On each of the small gears there was a guard on the front side and down and under to near the point where it meshed with its companion large gear. The journals of the upper shaft and wrist pins were out of reach of the oiler while standing on the floor. No appliance was provided with which to overcome this difficulty. During the first of appellant's work there was a pipe stand beside the pump frame forming two steps by means of which he was accustomed to ascend so as to reach the journal boxes and wrist pins. Several weeks before he was injured defendant caused such stand to be removed. Thereafter plaintiff had no way of reaching the places on the upper shaft to be oiled or examined but to stand on the pump base, take hold of some projecting point of the frame or of its connections, and so located reach up as high as practicable. By so doing the points needing attention could be looked after with some difficulty. The first time after removal of the pipe stand plaintiff had occasion to examine one of the wrist pins to see if it was overheating was the time when he was injured. It was in the nighttime. It seemed to him the pin on the east side of the pump needed attention. He stepped upon the base of the pump which, as usual, was oily affording an insecure footing. He placed one foot firmly upon the head of a projecting bolt in order to obtain the best footing practicable. He then with his left hand laid hold of the outside of the guard near the

lower part of the small gear, that being a convenient place for a handhold. He then with his right hand endeavored to take the temperature of the wrist pin. In doing so without fault on his part his foot slipped, causing his left hand to slide downward and inward on the guard aforesaid till it reached the point where the large wheel revolved toward and passed behind such guard at which point the hand was caught between the gear and the guard so injuring it that he lost the index and second finger. The injury was caused by failure of defendant to so guard or fence the gear as to prevent its being dangerous to plaintiff in the performance of his duties. Some time after the accident plaintiff by reason of the injury aforesaid was obliged to have a part of the third finger amputated.

There were some facts stated as to the particulars of plaintiff's damages and there was an appropriate allegation respecting the giving of notice as required by statute.

Defendant answered admitting the injury and service of notice alleging that the cause of the injury was absence of any facilities for safely reaching the points to be oiled and insufficient length of the gear guards. The allegations respecting negligence of the defendant were all put in issue and contributory negligence was pleaded.

There was evidence tending to prove the allegations of the complaint and other matters not specially pleaded but referred to in the verdict.

The jury found as follows: The defendant did not provide a step-ladder for use in doing the oiling. The gearing was so located as to be dangerous to the oiler in the discharge of his duties while using ordinary care. Defendant failed to have the gearing securely guarded or fenced. It was not practicable to guard the gearing so as to render it reasonably safe for plaintiff to perform his duties as oiler without a ladder. Failure to securely guard and fence the gearing was not the proximate cause of the injury. Plaintiff was not guilty

of a want of ordinary care proximately contributing to his injury. It will require $4,500 to fairly compensate plaintiff for his damages.

Numerous exceptions were saved to rulings made before and after verdict. Judgment was rendered notwithstanding the verdict in favor of the defendant, the court construing the same as requiring that result. Plaintiff appeals.

For the appellant the cause was submitted on the briefs of *Holland & Lovett.*

For the respondent there was a brief by *Kreutzer, Bird, Rosenberry & Okoneski,* and oral argument by *C. B. Bird.*

MARSHALL, J. Did the trial court err in awarding judgment to the defendant? That is the main question though some minor propositions are involved. To properly consider the major matter the purpose of sec. 1636*j*, Stats. (1898), as settled by judicial construction, must be appreciated. There is little room for want of such appreciation in view of the numerous instances in recent years where the court has dealt with the matter. In the aggregate almost every conceivable phase of the subject has been judicially treated and some of them over and over again, yet the record here shows there is some misunderstanding.

The vital words of the statute are, "all belting, shafting, gearing, . . . which are so located as to be dangerous to employees in the discharge of their duty shall be securely guarded or fenced." If the statute does not create a higher duty than that at common law it prescribes a statutory requisite of ordinary care on the part of the master and by necessary implication prescribes conditions which will give rise to a *prima facie* inference of negligence as matter of fact. It does not create a rule of absolute liability.

It seems the court at first was inclined to hold that a violation of the statute establishes negligence creating liability defendable against only by contributory negligence in

the ordinary sense, not including that special form denominated assumption of the risk. It was held in *Klatt v. N. C. Foster L. Co.* 97 Wis. 641, 73 N. W. 563, thus:

"Absence of the guard was negligence *per se*. . . . A failure to perform the duty so imposed constitutes actionable negligence at the suit of a person of that class, injured by such failure of duty, without contributory negligence on his part." "Where a statute requires an act to be done or abstained from by one person for the benefit of another, then an action lies in the latter's favor against the former for neglect in such act or abstinence, even though the statute gives no special remedy. The imposition of a penalty by the statute does not take the place of the remedy by suit for negligence, unless the penalty be given to the party injured in satisfaction for the injury."

That was but a redeclaration of what was said in earlier decisions. *McCall v. Chamberlain,* 13 Wis. 637; *Dunnigan v. C. & N. W. R. Co.* 18 Wis. 28; *Atkinson v. Goodrich T. Co.* 60 Wis. 141, 18 N. W. 764; *Toutloff v. Green Bay,* 91 Wis. 490, 65 N. W. 168.

It may be that all who concurred in *Klatt v. N. C. Foster L. Co., supra,* did not intend to hold that mere failure to comply with the statute was sufficient to create an inference of culpable negligence as matter of law, instead of an inference of fact in that regard rebuttable by showing that the failure did not involve any want of ordinary care in fact, as use of the term "negligence *per se*" would indicate, or intend to hold that the purpose of the statute or its necessary effect is to preclude defeating an otherwise meritorious claim on the ground of assumption of the risk, as use of the term "actionable negligence at the suit of a person of that class, injured by such failure of duty without contributory negligence on his part," might well, as an original proposition, be said to indicate. But any obscurity in that respect was removed by subsequent decisions.

The logic most favorable to employees was carried forward into *Burns v. C., M. & St. P. R. Co.* 104 Wis. 646, 80 N.

W. 927, without clearing up any existing uncertainty. But whether the legislative purpose was to abolish the defense of assumption of the risk was negatived by *Helmke v. Thilmany*, 107 Wis. 216, 83 N. W. 360, opinion by the then Chief Justice, declaring, in most emphatic language, that neither the defense of contributory negligence nor assumption of the risk was affected by the statute, citing *Thompson v. Edward P. Allis Co.* 89 Wis. 523, 530, 62 N. W. 527, and several previous cases under similar statutes. Thus the defenses were referred to as distinct, rather corroborating the idea that when *Klatt v. N. C. Foster L. Co., supra,* was written it was thought that only the defense of contributory negligence was preserved.

It should be noted, in passing, for accuracy of history, that neither in *Helmke v. Thilmany, supra,* nor any case cited therein was assumption of the risk necessarily mentioned or involved. The sole subject of controversy was contributory negligence, strictly so called. For myself, though I concurred in the decision, as I now read the case it seems contributory negligence was mistaken for assumption of the risk. I may well further observe that the present Chief Justice and Justice DODGE dissented upon the ground, as would appear by language used, that the turning question was assumption of risk though it would seem to the writer contributory negligence was really in mind. The distinction between the two phases of conduct is so shadowy, it is not to be wondered at that one is sometimes spoken of when circumstances more clearly characterizing the other are in mind.

However, *Helmke v. Thilmany, supra,* was followed in *Kreider v. Wis. River P. & P. Co.* 110 Wis. 645, 86 N. W. 662; *Upthegrove v. Jones & Adams C. Co.* 118 Wis. 673, 96 N. W. 385; *Walker v. Simmons Mfg. Co.* 131 Wis. 542, 111 N. W. 694, firmly establishing as a rule of construction of sec. 1636*j* the doctrine announced as stated, though it seems to the writer, looking backward, that in these cases the dis-

tinction between the two phases of contributory negligence, one of which strictly speaking is not such negligence at all, was not kept clearly in mind. In most of them, possibly all of them, assumption of the risk was not necessarily involved, in the judgment of the writer. That this challenged the attention of the lawmaking power leading to the act of 1905, passed before the last case cited originated, is most natural.

The foregoing leads up to the other feature of sec. 1636*j* which more particularly concerns this case, viz., whether its purpose was to make duty to guard, when otherwise the situation would be dangerous to employees in the discharge of their duties, absolute, rendering failure to comply, under all circumstances, culpable negligence as matter of law, as is perhaps inferable from *Klatt v. N. C. Foster L. Co.* 97 Wis. 641, 73 N. W. 563, instead of inferable as matter of fact only and so rebuttable by proof of guarding or fencing in the ordinary way, that not being obviously a dangerous way, and leaving to the employer some reasonable measure of discretion as to whether the situation in any case is within the statute and if so as to the manner and means of complying therewith.

On the subject last referred to the second alternative suggested was, seemingly, adopted as the test of actionable negligence in *Guinard v. Knapp-Stout & Co. Co.* 95 Wis. 482, 70 N. W. 671. The statute must have been there in mind because the situation dealt with was clearly within it, though it was not mentioned. It was held that the test of *prima facie* liability on the ground of negligence fixed by law was whether all safeguards were provided which the great mass of mankind ordinarily furnish under the same or similar circumstances; that the employer may not be required to be wise beyond that standard, and, in effect, that any other standard would be impracticable and unreasonable and might render the success of any legitimate enterprise impossible. That was in terms or effect repeated in many subsequent cases

dealing with statutory situations, though, it must be admitted, generally speaking, that the statute was not referred to, showing definitely that it was in mind. Some of the cases—enough to indicate quite clearly the type of all—were mentioned in the recent case of *West v. Bayfield M. Co.* 144 Wis. 106, 128 N. W. 992, where the doctrine of the *Guinard Case* was emphatically held to apply to the statute and that such had become the settled law before the act of 1905. It was thought that the long line of decisions referred to must have been made in view of the statute and that the rule thus developed, right or wrong, had become so firmly established as a part of the written law as if literally embodied in it. Out of the large number of decisions referred to—to the end that the obscurity, if any existed, might be cleared up—this was evolved as expressing the legislative intent: Except as to situations obviously dangerous "if the employer furnish such a guard as is in general use among employers of ordinary caution in the same line of business and under the same circumstances, he has discharged the duty imposed upon him, and the guard so furnished is in a legal sense reasonably safe and the dangerous machinery has been securely guarded within the meaning of the statute. This rule of law requires the master to exercise ordinary care in providing a guard or fence for such machinery as is required to be guarded or fenced." 144 Wis. 117.

The latter expression was grounded on *Powalske v. Cream City B. Co.* 110 Wis. 461, 86 N. W. 153, approved in *Hamann v. Milwaukee B. Co.* 136 Wis. 39, 116 N. W. 854; *Miller v. Kimberly & C. Co.* 137 Wis. 138, 118 N. W. 536. The idea therein conveyed is that whether a situation needs guarding or fencing for security as to dangers to employees must, necessarily, be a matter of judgment, as well as the extent and manner of guarding or fencing; and, as the law leaves that to the employer, it cannot be expected of him that he must exercise more care and judgment in respect to when

and when not to guard or fence, or a higher degree of care in executing the conclusion, in case of it being in favor of the protection, than is generally brought to bear on similar situations by the great mass of mankind under the same or similar situations; nor that after he has used such judgment he shall nevertheless be liable criminally and civilly for consequences of danger which could not have been reasonably foreseen from the standpoint of ordinary human foresight—in that respect that the statute should have the ordinary construction of ordinary penal provisions which do not express, unmistakably, a legislative purpose to deal with individuals engaged in legitimate business with extraordinary severity. It was thought this not only followed quite clearly the letter of many previous decisions but the logic of the whole body of unwritten law in this state respecting similar situations.

Even where by written law it was first provided that a railroad should fence its right of way or in default thereof be liable for damages to any person injured, it was held that the defense of contributory negligence was not abrogated and that the requirement was the exercise of a degree of diligence no greater than that of a town in respect to a highway. *Curry v. C. & N. W. R. Co.* 43 Wis. 665. It may well be said in passing that the element of reasonable anticipation is held to be essential to actionable negligence in highway cases the same as others dependable upon breach of duty to exercise ordinary care. *Fehrman v. Pine River,* 118 Wis. 150, 95 N. W. 105. In view of the doctrine of the *Curry Case* the railroad statute was amended so as to substantially, in express terms, abrogate the defense of contributory negligence in actions for damages for failure to fence a railway right of way; *Quackenbush v. Wis. & M. R. Co.* 62 Wis. 411, 22 N. W. 519, it being appreciated that unmistakable language was necessary to effect that result.

In *Dugan v. C., St. P., M. & O. R. Co.* 85 Wis. 609, 55 N. W. 894, it was held, in a similar situation as above, that

the defense of contributory negligence may be expressly given by statute and can only be taken away by express or unmistakable legislative language. So in case of the situation, in absolute terms, of a duty to do some act for the safety of others, even accompanied by an absolute liability for failure to perform the duty, taking the statute literally, and without going further the court will read out of it as having been necessarily intended, an exception saving the defense of contributory negligence unless to do so would, seemingly, actually violate the intent of the written law.

The general doctrine requiring the master absolutely to furnish his employee a reasonably safe place to work, has not been carried to the extent of making that duty stand the test of what a jury of twelve men may conceive to be required from their own viewpoint of reasonable safety, but the test of what such a jury may conclude is consistent with ordinary care which is said to be no greater than what is customarily done in the same or in similar situations. *Boyce v. Wilbur L. Co.* 119 Wis. 642, 97 N. W. 563.

The safe-place rule of the common law is as absolute as the statute in question and statutes in general creating duties respecting the personal safety of individuals, and yet, it will be seen by investigation that negligence is the foundation principle governing all, both from the standpoint of the employer and that of the employee, and that the general rules of what constitutes negligence are supposed to be embodied in the written law in the absence of unmistakable language in such statutes to the contrary.

Much more might be said on the subject above discussed but this is not necessarily the occasion for it. Hardly any need of it is liable to be imperative in any situation in view of the full discussion and establishment of definite rules in respect to the matter drawn as supposed from the letter and logic of many decisions, in *West v. Bayfield M. Co.* 144 Wis. 106, 128 N. W. 992. True, there was room for fair differ-

ence of opinion, in view of the initial declaration respecting the statute in *Klatt v. N. C. Foster L. Co.* 97 Wis. 641, 73 N. W. 563, and expressions in opinions here and there following that case. One with firm convictions, from an original standpoint, as to the intent of the legislature, might read such expressions, consider the trend of decisions, and come fairly to one conclusion, and another with or without a different view of the written law from such original standpoint might survey the body of unwritten law concerning it in the light of the logic dominating the whole, that it is failure to do that which is in general supposed to be efficient under the same or similar circumstances, which constitutes the real derelict of the unwritten law and that of the statute as well, in the absence of unmistakable language to the contrary, and might come to a different conclusion, as was the case in *West v. Bayfield M. Co., supra,* where doubtless all that could well be said from either viewpoint was expressed and the state of the law definitely determined.

Facing what has been said it is not difficult to discover the intent in sec. 1636*jj* which particularly concerns this case. It was doubtless seen by the legislature that neither the defense of assumption of the risk nor that of contributory negligence was disturbed by sec. 1636*j*, nor was the rule of absolute liability—liability regardless of fault by the ordinary standard of human foresight—substituted for the ordinary standard of care; that efficient negligence on one side was still the ground of liability and freedom from such negligence, in the broad sense, the condition of enforcing such liability. So with a view of removing any possible uncertainty as to the precise test of duty and removing at the same time to some extent common-law conditions of enforcing it, the new section was added to the written law as sec. 1636*jj* providing thus:

"In any action brought by an employee or his legal representative to recover for personal injuries, if it appear that the injury was caused by the negligent omission of his employer to

guard or protect his machinery or appliances, or the premises or place where said employee was employed, in the manner required in the foregoing section, the fact that such employee continued in said employment with knowledge of such omission, shall not operate as a defense." Laws of 1905, ch. 303.

Note the significant words in the new section *"negligent omission* of his employer to guard," etc. Obviously it was not intended to recognize two classes under sec. 1636*j*, one guilty of failure to guard, regardless of negligence in the matter, and one negligently failing to guard. Any failure under sec. 1636*j* was evidently in contemplation as a "negligent omission to guard," that term being used so that the written law would in its letter conform to the construction given by this court to such section.

If the desire of the lawmakers had been to increase the duty of employers to the point inferable, in one view from *Klatt v. N. C. Foster L. Co., supra,* they might easily have done that. If the thought was that the existing rule of the statute did not contemplate the ordinary standard of human duty to be the test of liability, certainly the language used would have been that of the section to which it was supplementary, viz.: "if it shall appear that the injury was caused by the omission of his employer to guard," etc., instead of by "the negligent omission to guard," recognizing negligence, by necessary inference, to be the dominating feature of the existing law. Again, if it had been thought to wholly abolish the defense involving conduct of the injured person the legislature might easily have used language expressing that purpose instead of "the fact that such employee continued in such employment with knowledge of such omission will not operate as a defense"—that is, the one fact commonly held to show assumption of the risk as matter of law and so establish a defense, shall not so operate. To that extent the court has held the defense of contributory negligence abolished, but the law is otherwise unchanged by the new section. *Klotz*

v. Power & M. M. Co. 136 Wis. 107, 116 N. W. 770; *Reffke v. Patten P. Co.* 136 Wis. 535, 117 N. W. 1004; *Lind v. Uniform S. & P. Co.* 140 Wis. 183, 120 N. W. 839; *Monaghan v. Northwestern F. Co.* 140 Wis. 457, 122 N. W. 1066.

In all of the cases cited the idea that negligent omission of duty is the fault dealt with by the statute is recognized. In *Klotz v. Power & M. M. Co.,* the element of reasonable anticipation, so vital to actionable negligence ordinarily, was clearly recognized as essential to characterize actionable fault under the statute. In the next case negligent omission of duty was treated as the dominating essential. In the next the question of whether under all the circumstances, guarding was reasonably necessary from the standpoint of what is ordinarily done in such cases was suggested as vital. That feature is not readily seen in the last case without referring to the instructions, no part of which are preserved in the reports, though the purport thereof one can reasonably infer from the opinion.

Looking at the record here in the light of the foregoing, whether error was committed in awarding defendant judgment instead of the plaintiff and if the latter, whether the case should be so disposed of as to render a new trial unnecessary does not seem to be fraught with much difficulty.

The jury found that the gearing was so located as to be dangerous to employees in the discharge of their duty. Did they find the circumstances such that the failure to guard was a negligent failure as provided by sec. 1636*jj* in its letter and by sec. 1636*j* as the same has been construed? No question was submitted specifically on that point, but the matter was covered by the manner in which the jury were instructed regarding the interrogatory as to whether the gear was so located as to be dangerous to employees in the discharge of their duty. The judge was very particular on this point, seemingly, fully appreciating that whether the situation was within the statute was not dependable upon what the jury

from their point might think, that is by a standard of their own; but what they might conclude from the evidence, testing the case by the standard of ordinary care given to them in this language:

"By dangerous as here used is meant such condition existing that an ordinarily prudent and intelligent employer, under all the circumstances stated in the question, ought reasonably to have foreseen that an injury to the oiler might probably occur by reason of the location and condition of such gearing."

Generally speaking such an instruction should not be confined to the particular employee but include all employees in the particular factory. That is not material here because no one except the oiler could, within reason, have been thought of as likely to come in contact with the uncovered gear. So it will be seen that the jury found the condition to have been respecting the duty to guard, within the statute according to the construction thereof in *West v. Bayfield M. Co., supra.*

The next question covered the subject of whether the statutory duty was performed. In respect thereto the jury found that defendant failed "to have said gearing securely guarded or fenced at the time of plaintiff's injury." The instruction at this point made prominent the idea that negligence was the controlling feature of actionable fault. The court said, "a gearing is securely guarded or fenced when it is so guarded or fenced that it would not be dangerous to any employee required to work in its vicinity if such employee uses ordinary care for his own safety."

Here we may well remark, in passing, that while the instruction was sufficient for the case it was too restrictive to be a safe model for all cases. So far as necessary to this case it followed *Powalske v. Cream City B. Co.* 110 Wis. 461, 86 N. W. 153; *Miller v. Kimberly & C. Co.* 137 Wis. 138, 118 N. W. 536; and similar cases. The language of the statute is not that the particular situation shall be

guarded against dangers to employees "required to work in its vicinity" but to guard where "dangerous to employees in the discharge of their duties"—any employee as said in effect in *Miller v. Kimberly & C. Co.* whom the master would have reasonable ground to anticipate might in the exercise of ordinary care be otherwise jeopardized in his personal safety.

So the jury found the statutory requisite of culpable negligence, viz., duty to guard—because it was negligence not to do so in that, as said in *Powalske v. Cream City B. Co.*, "a person of ordinary intelligence and prudence, circumstanced as defendant's officers or those having charge of its business were," would have apprehended that otherwise it "might probably cause a personal injury to some employee while in the discharge of his duty"—and failure to guard. That would seem to have left, in due course, only the question of whether the *culpa* in an unbroken chain of circumstances reached the point of injury and efficiently produced it—the fault having the essentials of proximate cause, most of which were covered by conclusions already reached—without any efficient contributing negligence of appellant, distinct from the assumption of risk abolished by the statute.

At this point, unfortunately, the trial court injected into the case a somewhat foreign element. The conditions of the statute being satisfied and there being no contributory negligence on the part of appellant, as the jury found, liability followed absolutely, as it seems. The statute as construed leaves no fair room to doubt but that such circumstances as were found make a clear remediable wrong. To inject any other independent circumstance into such a case might well create confusion under any circumstances. To inject such foreign element into the case as in itself controlling might or might not, according to the finding, nullify the statute as regards the particular case.

The foreign circumstance referred to is indicated in this question: "If you answer question No. 6 'Yes' [that is, find

the failure to guard], then was it practicable to have securely guarded such gearing so as to render it reasonably safe for plaintiff to do his work without a ladder?" The intent of the statute is that if an employer maintains a situation within it, which as an ordinarily prudent man he ought reasonably to apprehend may cause a personal injury to any of his employees in the discharge of his duty, he must hold himself responsible for the consequences proximately produced thereby to any such employee without his contributory negligence. In that situation the rule of the statute is inexorable. The charity of the law as to the employer has been exhausted. There are only left its penalties from which there is no escape under the law as it stands. It is no defense or excuse as regards civil remedies that it is not practicable to guard against the danger or to efficiently do so without some particular instrumentality, as in this case a ladder. If such particular instrumentality is essential to an effective guarding or fencing, then failure to supply it, as here, is involved in and part of the failure to securely guard or fence. We fully agree with counsel for appellant that the statute prohibits a person from using machinery under such conditions that, from the standpoint of ordinary care, the situation will imperil the personal safety of his employees in the discharge of their duties in the exercise of ordinary care. It is no answer to a case satisfying the statutory conditions that it was impracticable to comply with the statute. The police power, as the statute has been construed, was not exceeded in passing it. Therefore, the duty to comply therewith is absolute.

We are not unmindful the trial court may have been misled by some expressions in opinions of this court. It is exceedingly difficult to discuss at length the status of a given situation as regards legal liability, and avoid using any expression which cannot be made to do service in producing error in any other situation. Thus in *Lind v. Uniform S. & P. Co.* 140 Wis. 183, 120 N. W. 839, it was said, as if referring to a

vital matter under the statute, "there can be little doubt that the open unguarded trap door created a situation of danger for employees working around the opening, and it was a question for the jury to determine on the evidence whether such opening could be guarded without unreasonably interfering with the work that was being carried on, and which could not be performed with the doors closed." On the facts there under consideration the quoted language was probably legitimate. There was no thought, however, of holding, as to a case within the statute—one where a reasonably prudent man would or might reasonably apprehend injury to his employees or some one of them in the discharge of duty in the exercise of ordinary care without the protection contemplated by the statute—that unreasonable interference with operations by providing such protection, is a defense for failure to do so.

The same is true of an expression found in *Monaghan v. Northwestern F. Co.* 140 Wis. 457, 122 N. W. 1066, impracticability of covering gearing without seriously impairing the efficiency and use of the machine of which such gearing forms part, being spoken of as entering into the subject of whether there was negligent failure to guard or fence within the meaning of the statute. Of course, a machine must be kept sufficiently open so the work can practicably be done for which it was designed. So the statute provides for fencing as an alternative for guarding. It is not reasonably to be apprehended that an employee of ordinary intelligence and experience will allow his person to invade the necessarily open places in a machine. Otherwise operations by machinery would be practicably impossible. The question under discussion seems beside the case. If it were material in any aspect the ladder feature was not, except in so far as a ladder may be considered, under the circumstances, essential to rendering the guard on the gear sufficient. Further, unless the word "guarded" was intended to include the statutory duty

to guard or fence—either or both as the case might require—the question referred to but one feature of the statute. Both the failure to guard and failure to fence were charged in the complaint. This seems to have been overlooked.

Above all, if the question under discussion and answer, should have the meaning given thereto below, then the answer, it seems, should have been changed to "Yes." As we see the machine by means of photographs, it was perfectly practical to have boxed the gear in the manner such boxing is ordinarily accomplished in many similar situations within common knowledge. It is no answer to that, in view of the record, to insist the evidence shows the gear was boxed so far as customary respecting such machines; first, because there is no evidence that it is customary to locate such machines for operation and make no provision for reaching the parts to be oiled and examined from time to time without danger of coming in contact with the gears, as was the fact in this case; second, because it seems obvious that such exposed gears can be easily fenced so an employee can do his work about the machine in the exercise of ordinary care without danger of being perilously near thereto.

Following the last question treated the jury found that "such failure to guard and fence the gearing" was not the proximate cause of the injury to appellant. There, it will be seen, the term "guard" as well as the term "fence" was used in the conjunctive, preceded by the word "such," while the antecedent found in the preceding question is "guard" and the court in the opinion on the motion after verdict and before judgment gave point to the idea that only failure to "guard" was involved.

It seems best to speak of these numerous errors and inadvertences as an indication of the care required to avoid such results as happened in this case. It is not to be wondered at that the jury, after having reached the question under discussion, were perplexed as to their duty in respect thereto

and returned into court for some explanation. The practice at this point is not to be commended—calling the jury into court and allowing them to publicly declare the state of their deliberations, interrogating them openly as to what question they are considering and what questions have been answered and then changing instructions theretofore given to fit the situation.

The secrets of a jury room should not be disclosed in the public way indicated, if at all, till the final delivery into court. Till the end it is competent for the jury to change answers according to their convictions.

It is further not to be wondered at that the meaning of the verdict at last has to be read by the court out of some obscurity by construction, or that there has been difference of opinion up to this time whether it was read rightly, and differences among the jurors leading them after they were discharged to interview the judge in respect to what they intended to find and to make conflicting affidavits in respect thereto.

It is considered that the question under discussion should have been answered in the affirmative, as a matter of course, following the answers finding all the conditions of culpable negligence. Looking at such found conditions, the instructions, and the undisputed evidence, there was no room for fair controversy but what failure to comply with the statute was the proximate cause of the injury.

If, as the trial court thought, the disturbing ladder feature, given such unnecessary prominence, was supposed by the jury to cut such figure that they could not find the failure to guard and fence the gear of itself, was the proximate cause of the injury, and so answered the question as they did, then such finding was, in effect, that failure to guard and fence, under the circumstances, was such proximate cause. That would be sufficient for this case in any aspect. So, as counsel for appellant viewed the question, the answer

should have been changed to one in his favor. As the trial court viewed the question, the negative answer should have been construed as a finding in appellant's favor. Lastly, eliminating the question entirely from the verdict, the parts remaining and the evidence show that respondent's breach of duty was the proximate cause of the accident. So in view of the finding in appellant's favor on the subject of contributory negligence it seems clear he was entitled to recover.

It follows that the judgment must be reversed as erroneous, but not, necessarily, that the case must go back for judgment in favor of appellant for the full amount claimed. This court is not bound by any arbitrary rule in respect to the status of the case upon reversal. It is free, under the wise policy of the Code, to send the case back for a new trial, if justice requires it, otherwise not. Justice is the dominating feature of the Code and it is the policy of this court to vitalize that feature upon every proper occasion. To that end cases are uniformly so disposed of as to terminate litigation wherever that can justly be done. The interests of both parties, if not their mutual desires, require it; the interest of the public demands it; the spirit of the Code commands it.

We are well satisfied that the verdict of the jury was excessive. The trial court would have been justified, without motion, in allowing judgment in appellant's favor only upon condition of his remitting a large part of the jury award. On motion to that effect it would have been plainly the court's duty to have required such remission. That could have been done then and can now be provided for, compelling respondent to submit to a stated amount at the option of appellant, without prejudicially interfering with the right of trial by jury, if such amount be placed as low as in any reasonable probability any future jury, rightly instructed as to the law and with proper conception of their duty, would be

liable to award. *Baxter v. C. & N. W. R. Co.* 104 Wis. 307, 80 N. W. 644; *Rueping v. C. & N. W. R. Co.* 116 Wis. 625, 93 N. W. 843.

The appellant was forty-five years of age. He was without any educational fitness for any vocation having never attended school but three weeks. He was a common laborer, had never been and had no reasonable prospect of ever being anything else. His monthly earnings, when he worked all the time, were possibly as high as $65. He lost the first and second and part of the third finger. He lost in wages up to the time he recommenced work after he was injured $150 to $160. After that he lost about a week's time upon the occasion of having the third finger amputated. Respondent paid substantially all his medical and surgical expenses. His working capacity, as to some kinds of labor, was somewhat impaired, he suffered the usual amount of pain in such cases, and his hand will not sustain the former amount of use. However, his earning capacity was not greatly diminished. He was taken back after the injury at a raise of wages, the disability not interfering with that kind of work. He worked in his old position quite a long time, then left of his own accord and thereafter did substantially full work cutting cordwood, making ties, and performing other labor. The hand, down to the trial, continued to trouble him somewhat.

We have endeavored to give a pretty full statement of all there is in the case on which to base an assessment of damages. It is easily seen that the elements measurable with any great degree of certainty are rather small. It is useless to try to name an equivalent for parts of the human body. That subject runs so deeply into the field of conjecture as to render losses caused by deprivation of such parts recoverable on the basis of what one would take as an equivalent, impracticable. The naming of a money equivalent for pain and some other matters proper to be considered also go into

the realms of obscurity that, in the ordinary affairs of life, they would be regarded too uncertain to be recovered for, yet they and any bodily disfigurement are regarded as compensable in this class of cases, the basis being the reasonable, sound judgment of reasonable men applied to the evidence.

The expectation of appellant's life by the ordinary rules is about twenty-four years. His earning capacity, in the whole, for that time, appreciating that such a man rarely averages after the age of forty-five to work anywhere near full time for the rest of his life and at full wages, would not very greatly exceed the jury award. Forty-five hundred dollars is equal to a life annuity, purchasable in any standard insurance company, equal to more than two thirds appellant's working capacity for the balance of his days.

Without carrying the logic of the situation further it must be apparent that $4,500 for appellant is beyond all reason and that a jury of sensible men properly instructed might place the recovery as low as half that sum. The proper amount of the recovery would probably be the only vital question on another trial. Doubtless the best interests of all parties would be best subserved by having the controversy closed on the basis indicated, and we will so dispose of the case as to render that possible at the option of appellant.

By the Court.—The judgment is reversed, and the cause remanded for a new trial, unless plaintiff elects within thirty days after filing the *remittitur* in the court below to take judgment for $2,250 and costs, which he may do, if he so elects, on motion therefor and on due notice in the trial court.

SIEBECKER and BARNES, JJ., took no part.

TIMLIN, J. (*concurring*). In this case there was a special verdict as follows: (1) Had the defendant, prior to plaintiff's said injury, provided a step-ladder for the oilers to use in connection with the pump in question? Answered,

No. Questions (2), (3), and (4) not answered. (5) Was the gearing by which plaintiff was injured so located as to be dangerous to an oiler in the discharge of his duties while using ordinary care? Answered, Yes. (6) If you answer question number (5) "Yes," did defendant fail to have said gearing securely guarded or fenced at the time of the plaintiff's injury? Answered, Yes. (7) If you answer question number (6) "Yes," then was it practicable to have securely guarded said gearing so as to render it reasonably safe for plaintiff to perform his duties as oiler without a ladder? Answered, No. (8) If you answer the sixth and seventh questions "Yes," then was such failure to securely guard and fence said gearing the proximate cause of plaintiff's injury? Answered, No. (9) Did any want of ordinary care on plaintiff's part proximately contribute to produce his injury? Answered, No. (10) What sum of money would fairly compensate the plaintiff for the damages caused to him by his said injury? Answered, $4,500.

The circuit court, after denying the plaintiff's motion to change the answers to the seventh and eighth questions from "No" to "Yes" and for judgment, and the defendant's motion to change the answers to the first and ninth questions from "No" to "Yes," ordered as follows:

"It is further ordered that the motion of the defendant for judgment upon the verdict be and the same hereby is granted, and it is ordered that the clerk enter judgment herein upon the special verdict in this action, dismissing the plaintiff's complaint upon the merits and for costs in favor of defendant against the plaintiff."

The plaintiff appealed from a judgment entered pursuant to this order. The decision of this court, in which I concur, is that this judgment of the court below be reversed and that the plaintiff is entitled to judgment on the verdict above set forth. The requirement that plaintiff remit part of the damages found by the jury in order to entitle him to judg-

ment on the verdict rests alone on the conception that the damages found are excessive, and has no logical or legal relation to the questions of liability or those of statutory construction discussed. That part of the majority decision which undertakes to change the answer to the seventh question of the special verdict because, as said, it appeared from the photograph in evidence it was practicable to have securely guarded the gearing, and that part changing the answer to the eighth question above set forth from "No" to "Yes" because it appeared conclusively from the evidence that the failure to securely guard the gearing was the proximate cause of plaintiff's injury, necessarily decide that the practicability of securely guarding a gearing may be conclusively inferred from inspection of such gearing or of an accurate picture thereof, and that the proximate cause (which, according to a long line of decisions of this court, cannot exist as a proximate or legal cause unless the party responsible for such cause in the exercise of ordinary care ought to have anticipated therefrom some injury to another) may be inferred from the facts that the gearing was so situated as to be dangerous to employees in the discharge of their duties and was not securely guarded. With these two changes the verdict of the jury as above set forth may be restated as it is corrected and established by this court:

The defendant failed to provide a step-ladder for the oilers to use. The gearing by which plaintiff was injured was so located as to be dangerous to an oiler in the discharge of his duties while using ordinary care. The defendant failed to have the said gearing securely guarded or fenced. It was practicable to have securely guarded the gearing so as to render it reasonably safe for plaintiff to perform his duties. The failure to securely guard the gearing was the proximate cause of plaintiff's injury. There was no contributory negligence.

The verdict having been allowed to stand establishing the foregoing facts, the introduction of detailed evidential facts

only produces confusion. On these facts only, judgment is given for the plaintiff. The failure to provide a step-ladder may be eliminated as irrelevant. There is no finding that the defendant was negligent. The sole basis of the judgment for plaintiff is that the gearing was so situated as to bring it within the terms of the statute (sec. 1636*j*, Stats. 1898); that although it was practicable to do so the defendant failed to securely guard it; that the plaintiff was injured in consequence of such failure to securely guard such gearing so situated. I agree that this is the law. It is in harmony with *Klatt v. N. C. Foster L. Co.* 97 Wis. 641, 73 N. W. 563; *Smith v. Milwaukee B. & T. Exch.* 91 Wis. 360, 64 N. W. 1041, 30 L. R. A. 504, 51 Am. St. Rep. 912; *Sharon v. Winnebago F. Mfg. Co.* 141 Wis. 185, 124 N. W. 299; *Stafford v. Chippewa Valley E. R. Co.* 110 Wis. 331, 85 N. W. 1036; *Van de Bogart v. Marinette & M. P. Co.* 132 Wis. 367, 112 N. W. 443; *Walker v. Simmons Mfg. Co.* 131 Wis. 542, 111 N. W. 694; *Anderson v. Horlick's M. M. Co.* 137 Wis. 569, 119 N. W. 342; *Reffke v. Patten P. Co.* 136 Wis. 535, 117 N. W. 1004; *Hoffman v. Rib Lake L. Co.* 136 Wis. 388, 117 N. W. 789. There appears to exist in this court, observable in the majority opinion in this case as well as in many other opinions, a belief that the majority of the court by force of numbers and by mere proclamation can alter the *ratio decidendi* of a decision by declaring that it means something which aside from the proclamation it would not mean. I do not so understand the common law.

It is quite unnecessary to reiterate a dissent. I should not do so here but for the fact that the majority opinion goes out of its way to bring in *West v. Bayfield M. Co.* 144 Wis. 106, 128 N. W. 992, as a sort of harbinger of this case, and laboriously and lamely attempts to vindicate that decision as controlling this case notwithstanding my dissent in the *West Case* and my concurrence in this case. The real point decided in the *West Case* was that the jury was misinstructed

because the trial judge said: "By securely guarding it is meant that the defendant should guard the gearing safely that the persons who work about the gearing should be secure against danger or violence while performing their work." I thought then and still think that these words, while inaccurate and imperfect as a definition, were substantial language equivalents for what Justice MARSHALL, speaking for the court, said in *Anderson v. Horlick's M. M. Co.* 137 Wis. 569, 119 N. W. 342, and were substantially in accord with other cases mentioned. For the use of these words alone was the judgment in the *West Case* reversed, and it might be profitable to compare the instruction condemned in the *West Case* as erroneous or misleading with that mildly criticised but not considered so erroneous as to prevent a judgment by this court for the plaintiff in the instant case. The charge here was: "A gearing is securely guarded or fenced when it is so guarded or fenced that it would not be dangerous to any employee required to work in its vicinity if such employee uses ordinary care for his own safety." The difference appears to be between the words "should be secure against danger or violence while performing their work," and "would not be dangerous to any employee required to work in its vicinity." But in writing the majority opinion in the *West Case* the court went beyond what was necessary to the decision and resurrected the old case of *Guinard v. Knapp-Stout & Co. Co.* 95 Wis. 482, 70 N. W. 671, disregarding, and as I think overruling, a number of later decisions, and proclaimed law which I considered for reasons there stated erroneous and even absurd. If, as stated in the *West Case,* the employer is not bound to conform to the statute, sec. 1636*j*, but only to exercise ordinary care so to do, and especially if it be considered that this exercise of ordinary care may be established by proof of what other employers do in respect to covering gearings, then the verdict in this case would not warrant a judgment for plaintiff because it contains no find-

ing that the employer was negligent or failed to exercise ordinary care. Where there is no finding of negligence therein the verdict is defective unless the court can say as matter of law that negligence has been shown. *Orttel v. C., M. & St. P. R. Co.* 89 Wis. 127, 61 N. W. 289, cited with approval in *Morrison v. Madison,* 96 Wis. 452, 71 N. W. 882; *Beaton v. Milwaukee,* 97 Wis. 416, 73 N. W. 53; *La Fave v. Superior,* 104 Wis. 454, 80 N. W. 742; *Hildman v. Phillips,* 106 Wis. 611, 82 N. W. 566; *Strasser v. Goldberg,* 120 Wis. 621, 98 N. W. 554. In the instant case the judgment was for the defendant. In the absence of finding of negligence by the jury the effect of this judgment was to determine that there was no negligence. *Lehman v. C., St. P., M. & O. R. Co.* 140 Wis. 497, 122 N. W. 1059, citing sec. 2858*m,* Stats. (Laws of 1907, ch. 346); *Bates v. C., M. & St. P. R. Co.* 140 Wis. 235, 122 N. W. 745; *Bratz v. Stark,* 138 Wis. 599, 120 N. W. 396. There are other and later cases to this effect. Notwithstanding this condition of the record and on this verdict failing to find negligence, the judgment in the instant case is reversed and judgment ordered for the plaintiff. To my mind this is because, notwithstanding protestations to the contrary, the court has here again decided that the infraction of the statute, sec. 1636*j,* found by the verdict constitutes negligence *per se.* So the real decision in this case in which I concur is contrary to the case of *West v. Bayfield M. Co., supra.* There is no finding in this case that can be said to cover the question of defendant's negligence or of the item of anticipation in the question of proximate cause, and yet judgment is ordered for the plaintiff. There is nothing either in the verdict or in the evidence from which the inference of negligence can be drawn, except that the gearing was so situated as to be dangerous to employees in the discharge of their duty and that it was not securely guarded. I am quite aware that if one roil up the legal waters sufficiently he may draw therefrom whatever fish he

pleases, provided always he has the sole right to name the fish; and so I can understand that the majority by mere force of numbers and dogmatic assertion may declare this conclusion that the defendant was negligent a conclusion of fact. But that does not make it so. This is merely calling it by a selected name without reference to its real nature for the purpose of justifying the arbitrary conclusion that the result will be rebuttable by proof that this employer did as other employers do. In the *Klatt Case* this court declared that the failure to perform the statutory duty was negligence *per se*. Here, that the same failure is negligence in fact, which if not rebutted entitles the plaintiff to a judgment. It may be said there is not much difference. The regrettable thing is the confusion thus brought into the law. In the *West Case* it was declared (*obiter*) that it was sufficient to defeat or rebut this liability to show that other employers did not cover like gearings. This I think I have shown to be erroneous, if for no other reason than that it permits the class regulated by the statute, by acting together, to nullify the statute. This is attempted to be promulgated (*obiter*) in the instant case. But in the instant case this has also been coupled with the inconsistent declarations, (a), (b), (c), and (d), *infra,* which show that other more logical grounds ordinarily used to rebut negligence are not available against this so-called negligence in fact. I do not consider the fact that sec. 1636*jj,* Stats. (Laws of 1905, ch. 303), speaks of negligent omission to guard or fence at all significant or material. The presumption is that the lawmakers meant negligence *per se,* gathering their wisdom from the *Klatt Case* and subsequent confirmatory decisions. This reference to sec. 1636*jj* seems to me like grasping at straws. I cannot reconcile the statement that the fact of a gearing so located as to be dangerous to employees in the discharge of their duty, together with the fact that this gearing remained uncovered, established negligence of the employer as a conclusion of fact,

with the disposition made of this case or with the following quotations from the majority opinion:

(a) "The conditions of the statute being satisfied and there being no contributory negligence on the part of appellant, as the jury found, liability followed absolutely, as it seems. The statute as construed leaves no fair room to doubt but that such circumstances as were found make a clear remediable wrong. To inject any other independent circumstance into such a case might well create confusion under any circumstances."

(b) "The intent of the statute is that if an employer maintains a situation within it, which as an ordinarily prudent man he ought reasonably to apprehend may cause a personal injury to any of his employees in the discharge of his duty, he must hold himself responsible for the consequences proximately produced thereby to any such employee without his contributory negligence. In that situation the rule of the statute is inexorable. The charity of the law as to the employer has been exhausted. There are only left its penalties, from which there is no escape under the law as it stands. It is no defense or excuse as regards civil remedies that it is not practicable to guard against the danger, or to efficiently do so without some particular instrumentality, as in this case a ladder. If such particular instrumentality is essential to an effective guarding or fencing, then failure to supply it as here, is involved in and part of the failure to securely guard or fence."

(c) "We fully agree with counsel for appellant that the statute prohibits a person from using machinery under such conditions that, from the standpoint of ordinary care, the situation will imperil the personal safety of his employees in the discharge of their duties in the exercise of ordinary care. It is no answer to a case satisfying the statutory conditions that it was impracticable to comply with the statute. The police power, as the statute has been construed, was not exceeded in passing it. Therefore, the duty to comply therewith is absolute."

(d) "There was no thought, however, of holding, as to a case within the statute—one where a reasonably prudent man would or might reasonably apprehend injury to his em-

ployees or some one of them in the discharge of duty in the exercise of ordinary care without the protection contemplated by the statute—that unreasonable interference with operations by providing such protection, is a defense for failure to do so."

Each and every of the foregoing (a), (b), (c), and (d) is to my mind inconsistent with the broad statements contained in the majority opinion in the *West Case* and inconsistent with the quotation from that opinion approved in the majority opinion in the instant case. I am unable to detect any substantial difference between a duty to exercise ordinary care and "an absolute duty to exercise ordinary care." There is no doubt an important distinction between a rule which requires one to do or omit to do a designated act and a rule which merely requires one to exercise ordinary care. The common law presented instances of each rule. As the case of cattle straying from the premises of the owner and cattle escaping from custody while being lawfully driven on the highway. *Metropolitan C. Ins. Co. v. Clark, ante,* p. 181, 129 N. W. 1065. An innkeeper, like a carrier, was liable for all goods of his guest lost in the inn unless the loss happened by act of God or by that of a public enemy or by negligence of the owner of the goods. 22 Cyc. 1081 and cases. But in respect to the guest himself the duty of the innkeeper was only to exercise ordinary care for his safety. Id. 1080. Obligations or duties to another may be imposed by contract, by common-law rule, or by statute. Contract obligations or duties requiring specific things to be done or omitted can never be discharged by merely showing that the defendant exercised ordinary care but nevertheless failed. 9 Cyc. 625 *et seq.* The same is true as regards common-law duties or obligations which require some specific thing to be done or omitted. And the same rule applies to statutory duties or obligations. *Monteith v. Kokomo W. E. Co.* 159 Ind. 149, 64 N. E. 610, 58 L. R. A. 944; *Deserant v. Cerillos C.*

R. Co. 178 U. S. 409, 20 Sup. Ct. 967; *Hayes v. Mich. Cent. R. Co.* 111 U. S. 228, 4 Sup. Ct. 369, and cases in Rose's Notes to this case, vol. 10, p. 799, and vol. 2, Supp. p. 637; *Smith v. Milwaukee B. & T. Exch.* 91 Wis. 360, 64 N. W. 1041; *Sharon v. Winnebago F. Mfg. Co.* 141 Wis. 185, 124 N. W. 299, and other Wisconsin cases *supra; Klatt v. N. C. Foster L. Co.* 97 Wis. 641, 73 N. W. 563. The common expression is, in an action charging negligence, that the failure to perform a statutory duty owing to another, in consequence of which failure the latter is injured, is negligence *per se.* But these words are merely expressive of a broader and more general rule of law that where an obligation or duty is due from A to B and the latter is injured in consequence of a breach of that duty and without his fault, a cause of action results. In *Stork v. Charles Stolper C. Co.* 127 Wis. 318, 106 N. W. 841, the rule is stated as follows:

"It should be remembered that the injury resulted directly from contact with an uncovered gearing, the presence of which was not only unlawful under sec. 1636*j*, Stats. (1898), and therefore negligent, but might also have been considered negligence on the part of the defendant independently of such statute."

"Negligence may consist in a failure to conform to a specific rule of law or in a failure to act as a man of ordinary prudence would act under the same circumstances. When the act or omission violates a specific rule of law, it is negligence as matter of law." 2 Cooley, Torts (3d ed.) 1433. Neglect of statutory duties. Id. 1404, 1408.

From these authorities I think it is apparent that where the duty is specific, as in the statute in question, and one to whom the duty is due is injured by a breach thereof without fault on his part, a right of recovery is shown. The statute in question is neither doubtful nor obscure, except as it has been made so by decisions of this court, where, according to the opinion of the majority, "almost every available phase of the subject has been judicially treated and some of them

over and over again, yet the record here shows that there has been some misunderstanding." To my mind it is not at all wonderful considering the decisions above cited, and the present majority opinion will no doubt add to this misunderstanding. This is not an unfamiliar complaint in this court. *Patnode v. Westenhaver,* 114 Wis. 460, 90 N. W. 467. The remedy we should apply to ourselves. The statute in question shows that it was passed for the protection of employees engaged in working about or in proximity to belting, shafting, gearing, hoists, fly-wheels, elevators, or drums. Whenever these are so located as to be dangerous to employees in the discharge of their duty they shall be securely guarded or fenced. This imposes an absolute duty but not an absolute liability on the employer. The liability is not absolute or in the nature of insurance, for in order to recover the plaintiff must show that he is within the class intended to be protected, that the gearing, etc., was so located as to be dangerous to him in the discharge of his duty, and that the failure to securely guard or fence was the legal or proximate cause of the injury; and even after all this is established the employer may still escape liability by showing that want of ordinary care on the part of the employee also contributed proximately to cause his injuries. In other words, if both are at fault the whole loss falls on the employee. The question whether or not the gearing was so located as to be dangerous is a question of fact which permits a wide scope of inquiry, and so also is the question whether or not the failure to securely guard was the proximate cause of the injuries. Under the rule of law apparently settled in this state, that it is an essential element of proximate cause that the party sought to be charged ought in the exercise of ordinary care to have anticipated injury arising from such cause, this latter inquiry could be made in the investigation of proximate cause in a case properly raising a doubt on this point. But that question is not here and was not in the *West Case.* I prefer to

pass on this when it is properly presented for decision. When I proceed to examine the claim apparently put forward in the majority opinion, that prior to the decision in the *West Case* the statute had received a similar construction, I am at a loss to understand that opinion. The case of *Klatt v. N. C. Foster L. Co.* 97 Wis. 641, 73 N. W. 563, is introduced with the statement: "It seems the court at first was inclined to hold that a violation of the statute establishes negligence creating liability defendable against only by contributory negligence in the ordinary sense." So it only "seems" and that only "at first," and then the court did not hold but was only "inclined to hold." "Seems, madam," says Hamlet to his mother, "Nay, it is." This was not "at first," for *Klatt v. N. C. Foster L. Co.* is reported in 97 Wis. 641, while *Guinard v. Knapp-Stout & Co. Co.*, which in disregard of later cases became the guide in *West v. Bayfield M. Co.*, is reported in 95 Wis. 482. Surely this court was something more than merely "inclined to hold" that a violation of the statute establishes negligence when it used and approved the following language:

"Absence of the guard was negligence *per se*. A failure to perform the duty so imposed constituted actionable negligence at the suit of the person of that class injured by the failure of duty without contributory negligence on his part."

But it is said: "It may be that all who concurred in *Klatt v. N. C. Foster L. Co., supra,* did not intend to hold that mere failure to comply with the statute was sufficient to create an inference of culpable negligence as matter of law." We have no way of judging what they intended to hold except from the language used and approved as applied to the questions before the court, and there is nothing in that language to throw doubt upon their intention. Following the statement that it may be that all who concurred in *Klatt v. N. C. Foster L. Co.* did not intend, etc., there is a reference to and some discussion of *Burns v. C., M. & St. P. R. Co.*

104 Wis. 646, 80 N. W. 927, which I do not understand. That was a horse case as it now appears in print and not a master and servant case. *Helmke v. Thilmany,* 107 Wis. 216, 83 N. W. 360; *Thompson v. Edward P. Allis Co.* 89 Wis. 523, 62 N. W. 527; *Kreider v. Wis. River P. & P. Co.* 110 Wis. 645, 86 N. W. 662; *Upthegrove v. Jones & Adams C. Co.* 118 Wis. 673, 96 N. W. 385; and *Walker v. Simmons Mfg. Co.* 131 Wis. 542, 111 N. W. 694, are then discussed. But these cases are relevant only as to whether the defense of assumption of risk or that of contributory negligence is available and seem utterly foreign to the questions here under consideration. The majority opinion then abruptly takes the final plunge and sets up the standard of *Guinard v. Knapp-Stout & Co. Co.* 95 Wis. 482, 70 N. W. 671, against *Klatt v. N. C. Foster L. Co.* 97 Wis. 641, 73 N. W. 563, not to mention the later cases affirmatory of *Klatt v. N. C. Foster L. Co.* which I have cited above, and makes the earlier case in effect overrule the later case, always of course with the aid of *West v. Bayfield M. Co., supra.* If anything were necessary to demonstrate that the *West Case* was a reactionary decision, disregarding the later decisions of this court and going back to the old and discredited doctrine of the *Guinard Case,* this majority opinion in the instant case does so. Here again I am unable to understand how judges who consider the old law archaic and are filled with human sympathy for the victims of industrial accidents and welcome legislative relief (*Driscoll v. Allis-Chalmers Co.* 144 Wis. 451, 467, 129 N. W. 401, 408, separate opinion of WINSLOW, C. J., and BARNES, J.; and *Houg v. Girard L. Co.* 144 Wis. 337, 352, 129 N. W. 633, 639, separate opinion by MARSHALL, J.) could take this extraordinary and reactionary course of disregarding late numerous and established decisions in line with the law elsewhere and with the common law and resurrect an old case which had been in effect discredited in this state and by the consensus of authority elsewhere and endeavor to

resuscitate it so as to control the construction of this statute in a way to nullify the statute at the option of employers. Beyond doubt this is honest but nevertheless deplorable inconsistency. I cannot let this pass without protest, however unavailing that protest may be, and I feel convinced that time will justify this separate opinion.

Mr. Justice KERWIN, I am authorized to say, concurs in this opinion.

WILSON, Appellant, vs. SOLBERG, Respondent.

February 24—March 14, 1911.

Sales: Breach of warranty: Rescission: Reasonable time: Evidence.

1. Shoes sold to a retailer with warranty as to material and quality were placed by him in his store and some sales made therefrom. After about five weeks he discovered that they were not as warranted, and shipped back those remaining, tendering the money received for those sold. The vendor refused to receive the shoes or the money. The jury found that the defects were not obvious or observable to an experienced shoe dealer using ordinary care, and that the shoes were shipped back and the vendor notified of the breach of warranty within a reasonable time. *Held*, that there was a rescission and that the vendee was not liable for the purchase price.
2. In an action for the purchase price of goods, where defendant claimed that the sale had been rescinded for breach of warranty, a restriction as to the time in which claims must be made, printed upon the bill sent with the goods, bearing a date later than the contract of sale, and not shown to have been any part thereof, was not binding upon defendant or admissible in evidence.

APPEAL from a judgment of the circuit court for Lincoln county: A. H. REID, Circuit Judge. *Affirmed.*

This action was brought to recover the purchase price of shoes sold and delivered to defendant. The defense is breach of warranty as to quality and rescission of the contract of sale

on discovery of defects. The jury returned the following verdict:

"(1) Did the plaintiff in making the agreement for sale of the shoes here in question to the defendant in October, 1907, agree that the shoes then agreed to be sold should be made of solid leather? *A.* Yes.

"(2) Did the plaintiff in October, 1907, as a part of the agreement with the defendant for the sale of the shoes here in question, warrant that the shoes which would be delivered pursuant to said agreement would be of as good quality as any of like pattern then being sold to the retail shoe dealers in the market at the same prices? *A.* Yes.

"(3) If you answer question number 2 'Yes,' then did the shoes delivered to the defendant pursuant to said agreement conform to said warranty? *A.* No.

"(4) If you answer question number 3 'No,' then were the particulars in which said shoes did not comply with said warranty observable to an experienced shoe dealer of ordinary intelligence, using ordinary care and attention to his business? *A.* No.

"(5) Was the fact that the shoes delivered to the defendant in March, 1908, were not of solid leather observable to an experienced shoe dealer of ordinary intelligence exercising ordinary care and attention to his business? *A.* No.

"(6) Did the defendant ship back the shoes in question and notify the vendor that they were not in accordance with the agreement of purchase, within a reasonable time after having received the shoes? *A.* Yes."

Plaintiff moved for directed verdict and to change the answers to questions in the special verdict, which motions were denied and judgment rendered for defendant on the verdict, from which this appeal was taken.

For the appellant the cause was submitted on the brief of *T. L. Davison,* attorney, and *M. C. Porter,* of counsel.

For the respondent there was a brief by *John Van Hecke,* attorney, and *Wm. E. Fisher,* of counsel, and oral argument by *Mr. Van Hecke.*

KERWIN, J. The Chambersburg Shoe Manufacturing Company sold the bill of goods in question to defendant and before the commencement of this action assigned its claim to the plaintiff, and the action was brought by plaintiff as assignee of said Chambersburg Shoe Manufacturing Company. The order for the sale of the shoes was procured from the defendant by the traveling salesman for said Chambersburg Shoe Manufacturing Company and was solicited in the general course of business. The order was taken October 11, 1907, delivery to be made on or about March 1, 1908, and the goods were in fact delivered about the 10th of March, 1908. The defendant after receipt of the goods placed them in his store for sale with his regular stock and held them until April 17, 1908, during which time he sold a few pairs of the shoes for which he received $20.55, and about April 17, 1908, at which time he claims to have discovered that the shoes were not in accordance with the warranty, attempted to rescind the contract and return the shoes and money received for those sold. The Chambersburg Shoe Manufacturing Company refused to receive the shoes or the money. It will be seen from an examination of the special verdict set out in the statement of facts that the jury found all questions in favor of the defendant, and we think the findings have support in the evidence, therefore cannot be disturbed notwithstanding the appellant's claim that the verdict is unsupported by the evidence and that therefore the court erred in refusing to direct a verdict for appellant and to change the answers to questions in the special verdict. It is contended by counsel for appellant under this head that when goods are delivered on an executory contract with opportunity for examination and knowledge of defects which are open and obvious upon mere inspection, and the purchaser takes them into his possession and appropriates them to his own use without notifying the vendor at the time of receiving them or

within a reasonable time thereafter that they are not accepted, as not fulfilling the contract, he cannot rescind. This rule may be admitted, but we think the evidence does not bring the appellant within the rule. There is ample evidence in the case before us to warrant the jury in finding that the defects were not obvious and could not be discovered by mere inspection. The evidence is also ample to support the verdict that the shoes delivered did not conform to the warranty and that the defendant did return them and notify the vendor within a reasonable time after having received them that they were not in accordance with the warranty.

Error is also assigned in the exclusion of evidence. The appellant offered in evidence a certain exhibit which was claimed to be a duplicate of the bill of goods sold to the defendant and which had printed on it certain restrictions, namely, "No claims allowed unless made within five days from receipt of goods." This exhibit was dated February 29, 1908, and it was not shown that the printed matter above quoted was any part of the contract of sale. The court excluded the portion above quoted, and we think properly, for the reason that the restriction printed upon the bill of goods made and delivered after sale was not binding upon the defendant. *Morehouse v. Comstock,* 42 Wis. 626. We think no prejudicial error was committed, therefore the judgment of the court below should be affirmed.

By the Court.—Judgment is affirmed.

SCHMOLT, by guardian *ad litem*, Respondent, vs. H. W. WRIGHT LUMBER COMPANY, Appellant.

February 24—March 14, 1911.

Master and servant: Injury to minor servant: Knowledge of danger: Warning: Duty of master: Vice-principal: Negligence: Contributory negligence: Questions for jury: Special verdict: Instructions to jury: Burden of proof: "Accident:" Damages.

1. Plaintiff, a young man seventeen years of age, inexperienced in logging, whose incapacity as a teamster had been called to the attention of the defendant's foreman, was injured while walking, by order of the foreman and without warning of the danger, beside the pole team and driving the middle one of three teams attached to a loaded log sled, which was being pulled down a rather steep descent in a narrow roadway between banks of snow, by reason of one runner of the sled coming in contact with an obstacle, thereby causing the tongue to swing violently to one side and throw the near pole horse against him, felling him to the ground, where the sled ran over him. *Held*, upon the evidence, that the danger was not so obvious nor plaintiff's experience so sufficient as to warrant the court in saying as matter of law that he should have known such danger or that warning was unnecessary; and that the questions of negligence and contributory negligence were therefore for the jury.
2. In such case the fact of plaintiff's knowledge or lack of knowledge of the danger, and the fact whether he ought to have known of the same, were relevant as bearing both upon the question of defendant's negligence in failing to give warning and upon plaintiff's assumption of the risk and contributory negligence; and so far as they went to establish the former the burden of proof was on the plaintiff, but so far as they constituted essentials of the defenses named the burden was on the defendant.
3. The trial court having submitted these elements in an appropriate question, not directly or specifically, but as items of fact going to prove or disprove want of ordinary care on the part of defendant's foreman in failing to warn the plaintiff,—incorporating them into the question by the charge to the jury and instructing that the burden of proving such want of ordinary care was on the plaintiff,—it was not error to refuse to submit the

specific question whether a person of plaintiff's age and experience ought to have known that the tongue was liable to swing with enough force to throw the horse or neck-yoke against him.

4. Nor was it error in such case to submit separately the question of contributory negligence by the questions, "Did plaintiff know that in going down the hill the near pole horse was liable to be thrown to the side by the swinging of the tongue of the sleigh?" and "Ought the plaintiff, in the exercise of ordinary care, to have comprehended the danger of being thrown down by reason of the pole horse being thrown to the side by the swing of the tongue of the sleigh?" and to charge that, upon the issue so submitted separately from the question of defendant's negligence, the burden of proof was upon the defendant.

5. Under the facts as stated the duty, if any, to give warning was a duty of the master, which he must exercise himself or through a vice-principal,—in this case the foreman,—and if plaintiff's injury resulted proximately from neglect of this duty, concurring negligence of the foreman as a fellow-servant in some other duty would not change the result.

6. Where in answer to proper questions the jury found negligence of defendant and that it was the proximate cause of plaintiff's injuries, refusal to submit the question whether such injuries were the result of "mere accident" was not error, though in some cases such a question would be proper.

7. For an injury resulting in loss of an arm and in great pain and suffering, an award of $6,975, approved by the trial judge, is *held* not so excessive that it should be set aside by this court.

APPEAL from a judgment of the circuit court for Lincoln county: JAMES O'NEILL, Judge. *Affirmed.*

John Van Hecke and *Edward M. Smart*, for the appellant.

For the respondent there was a brief by *F. J. & A. H. Smith*, attorneys, and *Olin & Butler*, of counsel, and oral argument by *F. J. Smith* and *J. M. Olin*.

TIMLIN, J. Judgment went for the plaintiff on a special verdict as follows: (1) Did the plaintiff fall by reason of the near pole horse being thrown to the left by the swing of the tongue of the sleigh? Answered, Yes. (2) Did the defendant's foreman use ordinary care in not warning the plaintiff

that the pole horse was liable to be thrown to the side by the swing of the tongue of the sleigh in going down the hill? Answered, No. (3) If you answer the last question "No," then was such want of ordinary care by said foreman in not warning the plaintiff the proximate cause of plaintiff's injury? Answered, Yes. (4) Did want of ordinary care on the part of the plaintiff contribute to produce his injury? Answered, No. (5) Did the plaintiff know that in going down the hill the near pole horse was liable to be thrown to the side by the swing of the tongue of the sleigh? Answered, No. (6) Ought the plaintiff, in the exercise of ordinary care, to have comprehended the danger of being thrown down by reason of the near pole horse being thrown to the side by the swing of the tongue of the sleigh? Answered, No. (7) What sum will compensate the plaintiff for the injuries he received? Answered, $6,975.

At the close of the evidence the defendant requested the court to direct a verdict in its favor. The request was denied and due exception taken. After verdict the defendant moved to change the answers returned by the jury as above indicated to questions 1, 2, 3, 4, 5, and 6 of the special verdict because not supported by the evidence. In this way appellant brings up the question of the insufficiency of the evidence as a whole to support the verdict and the insufficiency as to each item of fact or group of facts represented by a question of the special verdict.

We cannot undertake in this opinion to review the evidence in detail. Summarized we think it tends to show and authorized the jury to believe that at the time of plaintiff's injury he was between seventeen and eighteen years of age and engaged in a lumber camp in driving a rather decrepit team, rolling logs on a sled by what is called cross-hauling and occasionally helping out the sled teams with their loads by hitching ahead where such aid was required. He had been engaged at this a little more than a week prior to the

time of his injury, which occurred on March 9, 1907. In the latter part of January, 1907, he came to this lumber camp and applied for work. This was his first attempt to work at logging. He was offered work as a teamster, but objected to this and informed the foreman of his inexperience. He was induced to attempt to drive team, but not at the same work in the performance of which he was injured. He began driving team and continued about a week. His ignorance and incapacity in that direction were so manifest that his fellow workmen objected. They called the attention of the foreman to it. The foreman took the reins out of his hands on several occasions and the plaintiff asked to be relieved and given other work. The foreman did relieve him from driving team and placed him at other work, and he continued this work until about a week before his injury when he was put on cross-hauling with a team. The plaintiff had little or no experience in logging and was awkward and quite incapable, to the knowledge of the foreman. On the occasion in question one of the sled teams, with a logging sled seven feet wide from runner to runner, carrying twelve-foot bolsters or bunks, was brought up to be loaded at a skidway on a side hill. The road from this skidway down to the main logging road was made by a snow plow something more than twelve feet in width in snow about two and one-half feet deep, and consequently had banks of snow on the sides and presented the appearance of a snow cut about twelve feet in width between the banks, and from the skidway in question it descended for the first 138 feet eleven feet to a short level place or shelf in the descent, and from this to the base of the hill, 452 feet, it descended twenty-seven and three-fourths feet, and there were several side curves. The sled team which handled the load of logs is called in the evidence the pole team. This team alone had power to hold back the sled in its descent. In order to enable this team to hold back the sled on the steep descent mentioned, hay was placed in

the runner tracks nearly all the way down, including the shelf mentioned. The sled was loaded with about 4,000 feet of hemlock logs, and the pole team with the load started down hill on the hay placed in the runner tracks until it reached the shelf in the descent. Here, by reason of the hay, the sled stopped and the pole team was unable to move it down. The foreman was present and directing operations. He ordered the plaintiff with his cross-haul team to hitch on ahead of the pole team and start the loaded sled. The plaintiff did so, and both teams were unable to start it off this shelf. He then ordered a third team hitched on ahead and some men to remove the hay from under the runners, intending that when the loaded sled was moved downward off this shelf either that the pole team should stop the sled and the two forward teams would be detached and the pole team would take the load down the remaining descent, or that the three teams should continue the descent. The plaintiff demurred, but the foreman paid no attention. He was then ordered by the foreman to take a position on the left side. The driver of the pole team was sitting on the load, the plaintiff, driver of the next team, standing in this cut near the runner track between that and the horses and slightly behind his team and about opposite the neck-yoke of the pole team and directly in front of the descending sled, and the driver of the lead team was also standing in this cut and near the runner track and in front of the descending sled, but of course about a team's length further from the sled. It was a most foolhardy proceeding. Here was a snow road consisting of a cut wide enough for the bolsters of the sleigh, with banks on either side, a steep descent, nothing to hold back the load but the pole team and the hay in the runner tracks, and two teams and two drivers in the cut ahead of the descending sleigh should it continue to descend. A stumble and fall meant danger or death. The three teams apparently made several attempts to start the load, swung the runners a little

to one side, got them off the hay, and so started the loaded sled down hill, the two drivers and the two forward teams running ahead and the pole team evidently unable to hold it back as soon as the runners left the hay. In the first part of the descent a sled runner on one side struck or met some obstacle, the tongue or pole swung to that side, threw the pole horse against the plaintiff, knocked him down, and the descending sled passed over him, severing one arm from the body and otherwise injuring him. Hintz, Jr., an experienced lumberman who seems to have kept his wits about him better than any of the others, tells how it happened. He says after the sled started they went down the hill faster than a run, and it was impossible to unhitch the forward teams. The foreman testified that the sled tongue did so swing over, and also that that was an inference or opinion of his, and again that he had said on a former examination that he saw it happen, and again that this was an opinion of his. The plaintiff testified that the tongue swung the horse over against him and that it was his opinion that the tongue swung. We cannot stick on mere words or weigh the verdict of a jury against mere literalisms, and it is manifest that the witnesses meant by "opinion" an inference derived from what they saw. Probably neither of them saw the pole or tongue at the critical moment, but plaintiff saw the motion of the horse and the foreman saw this and saw the movements of the sled, and it was not impossible to tell whether the horse left the track in the usual manner by being driven to one side by motion of the reins or moved by his own volition, which would be more or less of a slanting or gradual movement, or whether he jerked suddenly at about right angles to his course. We think there was evidence to support the finding that the pole swung and that the pole horse struck the plaintiff by reason of this after the load started.

It is probably common knowledge and within the experience of every young man who has driven horses that the pole

or tongue will whip or swing from side to side if the wheel or runner on one side of the vehicle meets an obstacle while the wheel or runner of the other side is free. But we cannot say it is within common experience that this will happen with such force and violence as to suddenly lift a team of horses and throw them to one side of the traveled track. This appears to be what happened in the instant case, due perhaps to the size of the load, the declivity of the hill, and the rapid descent. The plaintiff was ordered by the foreman into a very dangerous position. The foreman had knowledge at the time of the inexperience and incapacity of the plaintiff. The danger from swing of the sled tongue was not so obvious nor the experience of the plaintiff so sufficient as to permit us to say as matter of law that the plaintiff ought to have known of it, and it was a fair question for the jury whether or not, in the exercise of ordinary care at the time of putting the plaintiff into this position, the foreman should not have warned him of the danger of walking or running alongside the neck or shoulder of the pole horse in case the pole team was unable to hold back the descending sled and the three teams should be obliged to make the full descent of the hill. We think there was evidence from which the jury might infer that the plaintiff did not know, and was not necessarily bound in the exercise of ordinary care to know, that this swinging over of the pole horse was likely to happen, and that the defendant, through its experienced and presumably competent foreman, ought to have known not only of this danger but of the lack of knowledge and experience on the part of the plaintiff, entitling the latter to warning or instruction.

It is argued that the court erred in refusing to submit in the special verdict aforesaid a question requested by the defendant, which called for a separate finding of the jury, as to whether a person of plaintiff's age and experience ought to have known that the tongue was liable to swing with enough

force to throw the horse or neck-yoke against him, and also in instructing the jury that the burden of proof with reference to questions numbered 5 and 6 was upon the defendant. These objections may be considered together. From the form of the verdict given it is apparent that the court attempted to cover the question of defendant's liability by the first three questions and the contributory negligence of the plaintiff by the next three questions. No doubt other forms of expression might have been used, for the possibilities in this direction are almost infinite. The second question presented to the jury in very comprehensive form an important constituent of the liability of the defendant. It is uncontroverted that no warning was given to the plaintiff. The court instructed the jury with reference to this question:

"Where the dangers of an employment are visible, so that a person of ordinary intelligence, in the exercise of ordinary care, cannot fail to see and comprehend them, his employer is under no legal obligation to warn the servant of such danger. But if there exist facts known to the master and unknown to the servant increasing the risk of employment, or if the servant from youth, inexperience, ignorance, or want of general capacity may fail to appreciate the dangers, the master is bound to disclose such facts or give such instructions and cautions to the servant as will enable him to comprehend the risks and to do his work safely with proper care on his part. . . . But it is claimed the danger arising from the liability of the tongue to swing and throw the near horse over and against the plaintiff was not open or obvious, and comprehended by the plaintiff, or that in the exercise of ordinary care, considering his age and experience, he would not be expected to have comprehended it, and that in such case there should have been warning of such danger. This is a question which is for decision by the jury. It was the duty of the foreman to give to the plaintiff warning of such of the dangers not open and obvious to be apprehended from driving a tow team in the place in question as a boy of ordinary intelligence and prudence of the plaintiff's age and experience, so far as these matters were known and apparent

to the foreman, would not be likely, in the exercise of ordinary care by the plaintiff, to comprehend and foresee. If the foreman failed in performing this duty under these circumstances it was a want of ordinary care, and in such case the jury should answer the second question 'No.' "

The court also instructed the jury that if a boy of ordinary prudence and intelligence, of plaintiff's age and experience, exercising such care as such boys ordinarily exercise under similar circumstances, would have known or comprehended this danger or that the swing of the tongue would be liable to throw the pole team to the side, then there was no duty on the part of the foreman to warn him of this danger. The jury was instructed to consider all the facts and circumstances and say whether the foreman failed in any duty to warn and instruct the plaintiff, and that the burden of proof was on the plaintiff to prove by a preponderance of evidence that the foreman failed to use ordinary care in this respect. These instructions brought within the scope of the second question all that was attempted to be covered by the question proposed by defendant, and also cast the burden of proof upon the plaintiff to show that he did not know of the danger and ought not in the exercise of ordinary care to have known thereof. *Rahles v. J. Thompson & Sons Mfg. Co.* 137 Wis. 506, 118 N. W. 350, 119 N. W. 289. In this case the fact of plaintiff's knowledge or lack of knowledge of the danger in question, and the fact whether he ought to have known of the same, were relevant as bearing upon the duty to warn and consequently upon the liability of the defendant. These facts bore also upon the care which the plaintiff should exercise to avoid injury and upon his assumption of the risk, and consequently were relevant also to the issue of contributory negligence. So far as they went to show the defendant negligent the burden of proof was on the plaintiff to establish these facts and this negligence. So far as they constituted essentials of the defense of assumption of risk or contributory

negligence the burden of proof was on the defendant. The court below met this properly by including these elements in the second question of the special verdict, not expressly or specifically, but as items of fact going to prove or disprove negligence in failing to give warning, and properly instructed the jury that the burden of proof to establish all facts necessary to show defendant negligent was upon the plaintiff. There was no error in this. As he might do by special verdict, he then submitted three questions, each bearing upon the assumption of risk and contributory negligence if any on the part of the plaintiff. On this issue so separated by the special verdict from the question of defendant's negligence he properly charged that the burden of proof was upon the defendant. *Hulehan v. G. B., W. & St. P. R. Co.* 68 Wis. 520, 32 N. W. 529. Had the items of fact consisting of plaintiff's knowledge and his duty under the circumstances to know of the danger been submitted by separate question in that part of the special verdict relating to the defendant's negligence, the instructions would have been as given relative to the second question, viz.: that the burden of proof was on the plaintiff. But in that case it would not have been necessary to submit by repeating these same interrogatories again in that part of the verdict relating to assumption of risk and contributory negligence. They would be established by being found once. In the instant case the trial court grouped these facts in his instructions as constituents of the negligence or lack of negligence of defendant. When he came to submit the subject of contributory negligence in the exercise of a proper discretion he specialized further; he divided the subject of contributory negligence more into constituent parts, and having done so he might give the jury the rule relevant to the burden of proof relating to these constituents. He could not foresee what the answers of the jury would be, and in practice he might frame a special verdict so as to present the negligence of the defendant as one issue and the contributory negligence of

the plaintiff as a separate issue to the jury, each with its appropriate burden of proof, notwithstanding some fact bore such relation to each that it was a constituent of each issue.

There was no relation of fellow-servant between the foreman and the plaintiff in the matter of warning or instructing the plaintiff. That was a duty of the master which he must exercise himself or through a vice-principal. If the injury resulted from neglect of this duty as a proximate cause of such neglect, concurring negligence of the foreman as a fellow-servant in some other duty would not change the result. So we think there was no fellow-servant question to be submitted to the jury. *Grant v. Keystone L. Co.* 119 Wis. 229, 96 N. W. 535.

The appellant requested the court to submit to the jury thirty-eight questions, some of which are covered by the verdict submitted, some are mere items of evidence, and all of which carry the itemization or specialization of items of fact beyond the limit possible in the practical administration of justice. *Mauch v. Hartford,* 112 Wis. 40, 87 N. W. 816. One of these requested questions was: "Were the plaintiff's injuries the result of mere accident?" The cases of *Kucera v. Merrill L. Co.* 91 Wis. 637, 65 N. W. 374, and *Hennesey v. C. & N. W. R. Co.* 99 Wis. 109, 74 N. W. 554, are cited for the purpose of showing that it was error to refuse to submit this question. Unless the words "mere accident" are held to be descriptive of an act or omission producing injury not proximately caused by the negligence of the defendant, it must be obvious that a finding like this would constitute no defense and would be irrelevant. The event thus described must negative either defendant's negligence or proximate cause in order to be relevant as a defense. If it does present such negative it is covered by the findings of defendant's negligence and proximate cause. Cases can arise in which the evidence takes such a turn that it is proper to submit this question, but they are rare.

In the first case above cited there was no finding by the jury that the defendant was negligent and the plaintiff was unable to state how the injury was incurred. Under these circumstances it is said that such a question was proper. In the *Hennesey Case* the person injured was found near the railroad tracks dying from bodily injuries. He died in a few minutes without speaking. No one saw how the injury occurred; that question resting entirely on circumstantial evidence. While in *Zarnik v. C. Reiss C. Co.* 133 Wis. 290, 113 N. W. 752, it was ruled that the circuit court was justified in refusing to submit such a question where there were proofs tending to show negligence, witnesses to the transaction, and a finding of negligence by the jury. See, also, *Mauch v. Hartford, supra,* where the court said:

"Question No. 17 asked the jury whether the injury was the result of mere accident. That only tended to confuse the jury. It had no necessary or proper place in the verdict, under the circumstances, since the facts in issue constituting the alleged negligence and its proximate connection with the injury, rendering it actionable, were covered by proper questions."

The damages awarded to the plaintiff are large, but they have the sanction of the jury and of the learned trial judge. The permanent loss is certain, the pain and suffering must necessarily have been great, and we do not feel warranted under these circumstances in interfering with the amount approved by the jury and the trial judge.

Other questions presented have been considered, but do not appear to us to require special notice.

By the Court.—Judgment affirmed.

FRECHETTE, Appellant, vs. RAVN, Respondent.

February 24—March 14, 1911.

Pleading: Answer: Demurrer: Action, tort or contract? Malpractice by surgeon: Limitation.

1. **An answer should be held good on demurrer if it states a defense to any cause of action which plaintiff has pleaded and on which he has a right to rely.**
2. **Thus, in an action against a surgeon for malpractice where the complaint by liberal construction might be held to state a cause of action on contract, but was clearly intended to state a cause of action in tort and contains the necessary averments for that purpose, and plaintiff has made no election of the cause of action upon which he will rely, the defendant may plead the statute of limitations applicable to the action in tort, and the demurrer to such an answer should be overruled.**
3. **The limitation prescribed in subd. 5, sec. 4222, Stats. (1898),—requiring notice to be served within one year as a condition precedent to maintenance of an action for injury to the person,—is applicable to an action in tort for malpractice by a surgeon. [Whether it applies when such an action is based on contract, not determined.]**

APPEAL from a judgment of the circuit court for Lincoln county: A. H. REID, Circuit Judge. *Affirmed.*

This is an action for malpractice brought against the defendant, who is a physician and surgeon. On February 11, 1904, the plaintiff suffered injuries to his hands and right wrist. He applied to the defendant for medical and surgical treatment, which resulted in the amputation of his right hand at the wrist joint. Several bones in his left hand were broken and this injury was also treated by the defendant. Plaintiff brings this action for malpractice to recover damages in the sum of $20,000, setting up two causes of action in his complaint, (1) alleging negligent and unskilful treatment which resulted in the unnecessary amputation of his right hand, and (2) alleging that by reason of the negligent

and unskilful manner in which the defendant examined and administered to plaintiff's injuries the bones which were broken in his left hand were not set in place until eight days after the injury, as a result of which the fingers of said hand have become stiffened and the usefulness of the hand impaired, and that plaintiff has suffered great physical pain. The answer of the defendant is a general denial, and as a second defense to each of the two causes of action defendant alleges that he began his treatment of the plaintiff's injuries on the 11th of February, 1904, and that plaintiff left his care and treatment on February 25, 1904, and after that date received no further medical or surgical attention from him; that this action was commenced on February 4, 1910, and that no notice in writing as required by subd. 5, sec. 4222, Stats. (1898), has ever been served on said defendant. Plaintiff demurred to the second defense set out in defendant's answer, which demurrer was overruled. This appeal is taken from the order overruling plaintiff's demurrer.

For the appellant there was a brief by *Van Hecke & Fisher,* and oral argument by *John Van Hecke.*

For the respondent there was a brief by *Smart, Van Doren & Curtis,* and oral argument by *R. N. Van Doren.*

BARNES, J. The plaintiff has divided what is probably a single cause of action into two causes of action. No objection has been taken to the division, however, and we mention it lest the opinion should be construed as an approval of the method of pleading pursued. The wording of the two causes of action differs only in the recital of the character of the injuries, and both causes of action fall within the same category. For convenience in the subsequent discussion we will treat the complaint as though it contained but a single cause of action.

For the purposes of discussion in this case we will assume

without deciding that if the action is based on contract the one-year limitation contained in subd. 5 of sec. 4222, Stats. (1898), has no application to it. The action is plainly one to recover damages for injury to the person, and if it is in tort the one-year limitation referred to applies. The complaint states a good cause of action in tort, and it is apparent from the allegations therein found that the pleader intended to state a cause of action sounding in tort. It alleges that the defendant was employed to treat the plaintiff, but does not set forth what the contract duties of the defendant were in the premises and does not allege in terms that any contract obligation was breached. It does set forth that the defendant negligently and unskilfully examined the plaintiff and arrived at a wrong conclusion on such examination and negligently operated upon the plaintiff in an unskilful manner. Damages are asked for mental pain and suffering as well as for the injury to the hands and arms of the plaintiff. Such damages are hardly recoverable in an action on contract. *Walsh v. C., M. & St. P. R. Co.* 42 Wis. 23; *Brown v. C., M. & St. P. R. Co.* 54 Wis. 342, 349, 11 N. W. 356, 911. By a liberal construction of the complaint there is enough in it by way of averment to state a cause of action on contract. But applying to it the test prescribed in *Boehrer v. Juergens & A. Co.* 133 Wis. 426, 429, 113 N. W. 655, it is quite clear that the pleader intended to state a cause of action in tort and not one on contract.

In this situation, should this court treat the action as one on contract and not one in tort? If not, then the order of the circuit court overruling the demurrer to the plea of the statute of limitations contained in the answer is correct. It was said in *Bieri v. Fonger,* 139 Wis. 150, 153, 120 N. W. 862, that: "If facts are stated constituting a good cause of action, though not the one the pleader intended, the pleading is good as against a general demurrer." This rule is followed in *Bruheim v. Stratton, ante,* p. 271, 129 N. W. 1092.

No attack is made on the complaint in this case by demurrer or otherwise. The defendant does not seek to sustain its answer against the plaintiff's demurrer by asserting that the complaint does not state a cause of action.

Conceding that the complaint contains facts sufficient to state a cause of action on contract, it also contains the necessary averments to set forth a cause of action in tort. The plaintiff has made no election as to which cause of action he will rely on, and this court cannot make any election for him on the present state of the record. For aught we know he may be able to prove that the statutory notice was given or that it was waived, and will elect to pursue his remedy in tort, wherein damages are recoverable which cannot be awarded on contract and wherein he may have execution against the body to collect any judgment he may recover. While the plaintiff for the purposes of his demurrer admits that the notice was not served, he is also insisting that no notice is necessary in either a contract or a tort action, and he would be permitted on the trial to prove that notice was given. The cause of action in tort has not been withdrawn and may never be withdrawn. So long as it confronts the defendant he has the right to checkmate it by pleading the statute of limitations applicable to it. It is not a question of there being a cause of action on contract stated, to which the statute does not apply, but of there being a cause of action in tort stated, to which it does apply. As a complaint is held good on demurrer if it states any cause of action, so an answer should be held good on demurrer if it states a defense to any cause of action which the plaintiff pleads and on which he has a right to rely. Unless we say to the plaintiff, "Your complaint states a cause of action on contract and you must not rely on the cause of action in tort stated therein," we should not deny to the defendant the right to defend against the tort action that is stated. It was lawyer-like and proper for the defendant's counsel to answer as they did and nothing has occurred to render that answer improper.

If the plaintiff considered it advisable to proceed on contract rather than in tort he should have amended his complaint. Then if the statute of limitations were pleaded and the plea was not a proper one the demurrer would be well taken. So long as the plaintiff chooses to present a pleading for which different things may be claimed on the trial the defendant has a right to present an answer that is pertinent and applicable to the different aspects in which the complaint may be viewed. If this court should sustain the demurrer to the answer and the plaintiff should insist on the trial on his right to proceed and recover in tort, the trial court might have as difficult a problem to work out as he would encounter if he were trying to determine "how old Ann was." The plaintiff cannot be permitted to maneuver the defendant out of a valid defense to the cause of action in tort until he lets go of such cause of action.

By the Court.—Judgment affirmed.

CARLE and another, Appellants, vs. NELSON, Respondent.

February 24—March 14, 1911.

Sales: Vendee's refusal to accept: Measure of damages: Market value: Evidence: Witnesses: Competency: Special verdict: Form of questions: Burden of proof: Instructions to jury: Appeal: Prejudicial errors.

1. The measure of the vendor's damages for refusal of the vendee to accept goods is the difference between the contract price and the market value at the time of delivery fixed by the contract.
2. Market value is fixed by sales made at or about the time in question, and evidence of the price fixed in specific contracts entered into in the past is not competent.
3. The question of the competency of a witness to testify is a matter largely in the discretion of the trial court, and its ruling thereon will not be disturbed if there was no abuse of discretion.

4. Where a witness who had raised and sold eighteen crops of tobacco testified that he did not know the price tobacco was sold for at the time in question, but also testified that he knew what others were getting for tobacco at that time, although he did not really know it was the market value, it was proper to receive his testimony as to market value.
5. Where, after refusal of the vendees to receive his tobacco, the vendor sold the same for the best price obtainable in the vicinity, using all reasonable efforts to that end, the price so obtained settles the question of market value and furnishes the basis for measuring the vendor's damages.
6. Each question in a special verdict should be so framed that the issue will be determined by any responsive answer thereto.
7. Thus, the issue being as to market value, a question asking in effect, Did the vendor use reasonable efforts to sell the tobacco at the highest price obtainable in the vicinity after it was rejected by the vendee? was objectionable because if answered in the negative the issue would not be determined. But the answer in this case being in the affirmative, the error was harmless.
8. The issue made by the complaint and answer and the issue made by a counterclaim and reply are distinct issues in different causes of action and should never be embodied in the same question in a special verdict, even though they apparently relate to the same subject matter.
9. As to each question properly submitted for special verdict the burden of proof is either upon the plaintiff or upon the defendant. It cannot rest partly upon each.
10. An instruction as to a material question to the effect that, whether they answered it yes or no, the jury should be satisfied to a reasonable certainty by the preponderance of the evidence that the fact was as expressed in such answer, was erroneous as against the party upon whom the burden of proof did not properly rest.
11. The party upon whom such an instruction casts a greater burden than the law requires may justly complain thereof if the jury's answer is unfavorable to him.
12. The error in such a case must be deemed to have affected substantial rights of the party so complaining, within the meaning of sec. 3072*m*, Stats. (Laws of 1909, ch. 192), if there was any evidence in the case to support a finding in his favor, since the court cannot say but that the jury might have so found under correct instructions.
13. Such an error is not cured by another and correct instruction as to the burden of proof.

APPEAL from a judgment of the circuit court for Columbia county: CHESTER A. FOWLER, Circuit Judge. *Reversed.*

Action brought to recover the sum of $75 which defendant received from plaintiffs as an advance payment upon the purchase price of his 1906 crop of tobacco, which was never delivered. The defendant interposed a counterclaim alleging that, although the tobacco conformed to the requirement of the contract of purchase, it was rejected by plaintiffs, to his damage in the sum of $187.65, for which sum, less the $75 paid him, he demanded judgment. Upon the verdict of the jury the court awarded judgment in favor of defendant upon his counterclaim in the sum of $184.95 and dismissed plaintiffs' complaint. The plaintiffs appealed.

The cause was submitted for the appellants on the brief of *Daniel H. Grady,* and for the respondent on that of *Aylward, Davies, Olbrich & Hill.*

VINJE, J. Defendant introduced evidence as to market value of tobacco at the time his was to have been received, for the purpose of showing the damage he had sustained by reason of its rejection by plaintiffs. Obviously the measure of his damage was the difference between the contract price and the market value at the time of delivery called for by the contract. In this state of the case plaintiffs claimed it was error to exclude testimony offered by them to show how the price in the contract in question compared with that in other contracts under which tobacco was being received at the time. The exclusion of this evidence was manifestly correct. The price of tobacco as fixed by specific contracts entered into in the past was not competent evidence as to the market value of tobacco at the time delivery was to be made by the defendant. Market value at any given time is fixed by sales made at or about that time, and not by sales under specific contracts made in the past.

Plaintiffs also assign as error the admission of defendant's testimony on the question of market value on the ground that

he had shown himself incompetent. It is true he testified at one place that he did not know the price tobacco was selling for at that time, but he also testified he knew what others were getting for tobacco at that time, although he did not really know it was the market value. It appeared from the evidence that defendant had raised tobacco for eighteen years and had sold as many crops. The question of the competency of a witness to testify is a matter resting largely in the discretion of the trial court, and its ruling thereon will not be disturbed on appeal unless there is an abuse of such discretion. *Robinson v. State,* 143 Wis. 205, 126 N. W. 750. We think it was proper to receive the testimony of defendant as to market value.

It appears that the defendant, after plaintiffs refused to receive his tobacco, sold it to one McGiffin for eleven cents per pound for wrappers and binders and five cents per pound for fillers, instead of the contract price of fourteen and five cents respectively; and the court, in order to ascertain the amount of defendant's damage under his counterclaim, submitted this question to the jury: "Did the defendant use reasonable efforts to sell the tobacco at the highest price obtainable in the vicinity after it was rejected by plaintiffs' agent?" The jury returned an affirmative answer to this question, and such answer, under the rule laid down in *T. B. Scott L. Co. v. Hafner-Lothman Mfg. Co.* 91 Wis. 667, 65 N. W. 513, settled the measure of damages. It is there said:

"So the true rule is that, in an action for damages for the refusal on the part of the vendee to accept goods as agreed in his contract of purchase, the measure of damages is the difference between the market value of such goods at the time of the breach, and the price the vendee agreed to pay; and when a resale is made within a reasonable time, though made at auction, as in the case of *Bigelow v. Legg, supra* [102 N. Y. 653, 6 N. E. 107], the price obtained is evidence to be considered on the question of the market value at the time of such breach, and if a resale is made, and the evidence shows

that all reasonable efforts were made to secure the best price obtainable, or that the price obtained was a fair one, it settles the question of market value, so that the damages become liquidated."

Here the affirmative answer to the question established the fact that the defendant used all reasonable efforts to sell the tobacco at the highest price obtainable in the vicinity, and hence the price so obtained could be properly considered as the measure of his damages. But it is evident, as pointed out by counsel for plaintiffs, that if a negative answer had been returned, no measure of damages would have been established, and the issue on that branch of the case would have been undetermined. Questions of a special verdict should always be so framed that the issues will be determined no matter how they are answered, assuming the answer to be responsive to the question. In this case, in view of the answer, the error is harmless. But if the trial court had submitted the question requested by plaintiffs' counsel, the issue would have been determined by any responsive answer thereto. That question was: "What was the market value of tobacco of the kind and character specified in the contract, at the time and place for delivery of the tobacco in question as provided by the terms of said contract?" Care should be exercised by trial judges to see that each question of a special verdict is so framed as not only to clearly include the issue of fact intended to be embraced therein, but also to permit its being determined by any responsive answer that may be returned; otherwise parties and the public may be subjected to needless expense.

The first question submitted to the jury read: "Was the defendant's tobacco, when rejected by the plaintiffs' agent, in good packing condition, all trash and damaged tobacco excluded, wrappers and binders packed in bundles with fillers excluded, fillers tied in hands and packed in bundles?" This question was submitted for the purpose of determining

whether or not the defendant was entitled to recover on his counterclaim, that being the only pleading interposed by him, and in reality the only issue between the parties, as the defendant, after the opening of the trial, admitted the contract set out in the complaint; that he received $75 in payment thereon; that no part of the $75 had been repaid; and that no part of the tobacco had been delivered by him under the contract. Hence the burden was clearly upon the defendant to satisfy the jury by a preponderance of the evidence and to a reasonable certainty that the question should be answered in the affirmative. Nevertheless the trial court instructed the jury as follows:

"You will answer this question according to the fact as you are satisfied from the preponderance of the evidence the fact is. That is, you will answer the question 'No' if you are satisfied to a reasonable certainty by the preponderance of the evidence that the fact is as expressed by such answer, and you will answer the question 'Yes' if you are satisfied to a reasonable certainty by the preponderance of the evidence that the fact is as expressed by that answer."

It is possible that such an instruction might be held nonprejudicial were a proviso added that in the event the evidence was so evenly balanced that the jury were unable to determine upon which side the preponderance lay then they should answer it in the negative. In the absence of such a proviso, and as given, it was clearly erroneous. Counsel for defendant makes this ingenious argument:

"The situation regarding the first question of the verdict and the instruction applicable thereto undoubtedly appealed to the trial court thus: The plaintiffs' right to recover is predicated upon the jury's answering the first question of the verdict 'No;' the defendant upon his counterclaim predicated his right to recover upon the jury's answering the *same question* 'Yes.' Both demanding affirmative relief, the one recovering had the burden of establishing the fact as he claimed it to be to a reasonable certainty by a preponderance of the evidence. Hence the charge as given upon this question."

If such a construction be given the question then it is a double one, asking, in effect, Are the plaintiffs entitled to recover on their complaint? and, Is the defendant entitled to recover on his counterclaim? The submission of such a question would be error. The issue made by a complaint and answer and the issue made by a counterclaim and reply are distinct issues in different causes of action and should never be embodied in the same question though they apparently relate to the same subject matter. Each question of a special verdict must relate to a single material issue of fact and admit of a direct answer. Sec. 2858, Stats. (1898). And as to each question the burden of proof is either upon the plaintiff or the defendant. It cannot rest partly on each. *Jackman v. Inman,* 134 Wis. 297, 114 N. W. 489. We think the only rational construction that can be given the question, in view of the pleadings, admissions, and state of the case at the time the instructions were given, is that it was submitted to settle the issue as to whether or not the defendant should recover on his counterclaim. That being so, the burden was upon him to show himself entitled to an affirmative answer by the requisite *quantum* and quality of proof.

But it is urged, even if the burden of proof did rest upon the defendant to establish the affirmative of the question, the instruction given did not and could not prejudice the plaintiffs, inasmuch as by answering the question "Yes" they must have found such fact by a preponderance of the evidence and to a reasonable certainty. This reasoning seems plausible, but it overlooks the fact that the jury may have arrived at the answer they did owing to the erroneous instruction that they could not answer it in the negative unless they were satisfied by a preponderance of the evidence and to a reasonable certainty that it should be so answered. It is manifest that the instruction, "you will answer the question 'No' if you are satisfied to a reasonable certainty by the preponderance of the evidence that the fact is as expressed by such answer,"

was erroneous and prejudicial to plaintiffs, because in the absence of sufficient evidence to preponderate in favor of an affirmative answer they should have been instructed to answer it in the negative. But this the instruction did not permit them to do. Had they answered it "No," the plaintiffs would be in no position to allege error on account of the erroneous instruction, as the answer would have been favorable to them. It ought to follow as a matter of course that a party upon whom a greater burden has been cast by an instruction than the law requires can justly complain thereof when the answer is unfavorable to him. Such error cannot be deemed cured by a correct instruction as to the burden resting upon the opposite party. *Jackman v. Inman,* 134 Wis. 297, 114 N. W. 489. As to this question the court should have instructed the jury that the burden was upon the defendant to satisfy them by a preponderance of the evidence and to a reasonable certainty that the question should be answered in the affirmative, and that unless they were so satisfied they should answer it in the negative. The plaintiffs requested an instruction to this effect and the refusal to give it was error. *Pelitier v. C., St. P., M. & O. R. Co.* 88 Wis. 521, 60 N. W. 250; *Ward v. C., M. & St. P. R. Co.* 102 Wis. 215, 78 N. W. 442; *Odegard v. North Wis. L. Co.* 130 Wis. 659, 110 N. W. 809. Where there is an erroneous instruction as to the burden of proof upon a material issue, such error must be deemed to affect the substantial rights of the party, and the provisions of sec. 3072*m,* Stats. (Laws of 1909, ch. 192), cannot be invoked to save the judgment. Even where a correct rule is stated in the charge, followed later by an erroneous one, it has been held that the error is of such a substantial nature as to work a reversal of the judgment. *Parker v. Hull,* 71 Wis. 368, 37 N. W. 351.

Lastly, we are asked to affirm the judgment, though the charge was erroneous, on the ground that the question of fact embodied in the first question of the special verdict was

neither close nor doubtful, and the jury's answer thereto was abundantly supported by the evidence. Conceding there was ample evidence to support the verdict, still that is not sufficient to prevent a reversal of the judgment. It is only in case the evidence would warrant a direction of the verdict that an error in an instruction as to the burden of proof upon a material issue can be regarded as nonprejudicial. For if there is any evidence in the case to support a contrary finding, the court cannot say but that the jury might have so found under correct instructions. See *Jackman v. Inman,* 134 Wis. 297, 114 N. W. 489. In this case the evidence would sustain a negative answer to the first question, and hence the judgment must be reversed.

By the Court.—Judgment reversed, and cause remanded for a new trial.

SMITS, Plaintiff in error, vs. THE STATE, Defendant in error.

February 24—March 14, 1911.

Witnesses: Physicians and surgeons: Qualification as experts: Privilege: Criminal law: Rape: Leading questions to child: Discretion: Irrelevant testimony: Harmless errors: Complaint by prosecutrix: Details: Instructions to jury: Statutes: Implied repeal: Cruel and unusual punishment.

1. Under sec. 1436, Stats. (Supp. 1906: Laws of 1903, ch. 426, sec. 8), a physician who qualifies as an expert under general common-law rules may be allowed to testify as such in a criminal case, even though his license has not been recorded as required by sec. 1435*e* (Supp. 1906: Laws of 1903, ch. 426, sec. 5).
2. Testimony of a witness that he is a practicing physician duly licensed to practice in this state must be held to mean, *prima facie,* that he has fully complied with the license law.
3. Where a physician called as a witness in a rape case testified that he had been an active practitioner for a number of years, it will be inferred that he was qualified by practical experience to testify as an expert, in the absence of any cross-examination as to such qualification.

4. If sec. 4075, Stats. (1898), providing that no physician shall be compelled to disclose information acquired in attending a patient professionally which was necessary to enable him to prescribe for the patient, applies to criminal cases,—a point not decided,—the conditions mentioned must affirmatively appear in order to call for its application.
5. Leading questions may, in the discretion of the trial court, be put to the complaining witness in a rape case where she is young and is obliged to testify concerning matters which womanly modesty prompts her to conceal.
6. Where, to corroborate her testimony as to her age, the complaining witness in a rape case was asked and stated the date of her confirmation, it was not materially prejudicial to allow her to state in what church she was confirmed.
7. Whether, in proving that the assaulted female made early complaint, it is admissible to show that she named defendant as the guilty person, is not decided; but no prejudicial error is made to appear by recitals in the record showing only that, during the opening statement of the district attorney as to what he expected to prove, an objection was made upon some such ground, where it does not appear what the remarks were to which the objection was made, and no evidence of the kind was offered or received.
8. Where the fact of penetration by the ravisher was conclusively established, it was not error to refuse to instruct the jury that if they found there was no penetration they might find defendant guilty of assault with intent to commit rape.
9. Sec. 4580, Stats. (1898), as amended by ch. 296, Laws of 1907, relating to fornication with a female under the age of fourteen years, did not have the effect to repeal sec. 4382, Stats. (1898), relating to rape of a female under that age, but both statutes can stand together.
10. Imprisonment for thirty years for rape upon a female under the age of fourteen years, under sec. 4382, Stats. (1898), is *held* in this case not so disproportionate to the gravity of the crime as to violate the constitutional inhibition against cruel and unusual punishments.

ERROR to review a judgment of the municipal court for the eastern district of Waukesha county: C. E. ARMIN, Judge. *Affirmed.*

The cause was submitted for the plaintiff in error on the brief of *D. J. Hemlock,* and for the defendant in error on

that of the *Attorney General* and *J. E. Messerschmidt,* assistant attorney general.

WINSLOW, C. J. The plaintiff in error was convicted of the crime of rape upon a female under the age of fourteen years in violation of the provisions of sec. 4382, Stats. (1898), and sentenced to imprisonment for thirty years.

Most of the errors claimed relate to rulings upon the trial and they will be briefly considered in their order.

Two practicing physicians, who made examination of the person of the complaining witness after the alleged rape, were allowed to give expert testimony in the face of objection that they had not qualified themselves to testify as medical experts, and these rulings are assigned as error. One of the physicians testified that he was a graduate of a medical college and was a practicing physician in the city of Waukesha, duly licensed to practice in this state, and had been practicing for nearly five years; the other testified that he was a regular duly licensed practicing physician in Waukesha and had practiced there eleven years. The objection is that it did not appear that they had recorded their licenses with the county clerk as required by sec. 1435*e,* Stats. (Supp. 1906: Laws of 1903, ch. 426, sec. 5), and hence that under sec. 1436, Stats. (Supp. 1906: Laws of 1903, ch. 426, sec. 8), they are debarred from testifying as experts.

There are two sufficient answers to this objection: *first,* the last mentioned section provides that nothing therein shall be construed as restricting any court in a criminal action from receiving the testimony of any person as a witness, thus apparently leaving courts free in criminal cases to receive the testimony of physicians who qualify themselves as experts under general common-law rules, regardless of the requirements of this statute; *second,* the statement that they are duly licensed to practice and are practicing must be held to mean *prima facie* that they have fully complied with the

license law, because the first above named section makes it unlawful for a physician to practice in the state who has not first recorded his license. Had the accused desired, he could have cross-examined the witness fully as to his qualifications before his examination as an expert.

Another objection is urged to the effect that neither of the physicians qualified himself because neither testified that he had ever had practical experience in a case of this kind. Both testified that they were active practitioners and had been such for a number of years. This carries with it the fair inference that their testimony was based on actual experience. It was open to the accused to cross-examine them as to their practical knowledge, but he did not choose to do so. *Miske v. Thom,* 144 Wis. 178, 128 N. W. 858.

It is further claimed that the physicians should not have been allowed to testify because their information was gained while treating the complaining witness professionally and hence comes within the inhibition of sec. 4075, Stats. (1898), which provides that no physician shall be compelled to disclose information acquired in attending a patient professionally and which information was necessary in order to enable him to prescribe for the patient.

We do not decide whether this statute applies to criminal cases, but, assuming that it does, it must affirmatively appear, in order to call for its application, that the information was acquired while the physician was attending the patient in his professional capacity and that it was necessary in order to enable the physician to prescribe. Neither of these facts appears and hence there was no error in any event.

Objection is made that the state was allowed to put leading questions to the prosecuting witness, and such is the fact, but in cases of this nature, where the witness is young and is obliged to testify concerning matters which every instinct of womanly modesty prompts her to conceal, the rule is well

established that leading questions are almost always necessary in order to get at the facts. A child who would testify glibly as to such matters would be justly regarded with suspicion. It does not appear in the present case that the discretion of the court was abused.

The complaining witness was asked without objection whether she was confirmed this year and answered "Yes," the intention evidently being to corroborate her statement as to her age. She was then asked in what church, and replied against objection, "In the German Reformed Church." The admission of this answer is alleged as error. Its relevancy is not made to appear satisfactorily, and we should have been better pleased had the objection been sustained. We are unable, however, to conclude that the reception of the answer was materially prejudicial.

It is claimed that prejudicial error was committed in a ruling by the court during the opening statement of the district attorney. The record shows the following facts:

"During the opening statement the attorney for the accused said: 'I object to that as incompetent, irrelevant, and immaterial, the talk with the district attorney, as not being allowed to discuss it.' By the court: 'I think he has a right to state that she made complaint, that he has a right to do.' Exception taken. Defendant's attorney: 'What *Mr. Smits* had done to her? I object to the statement of the district attorney that she complained to Dr. Murphy and Dr. Davies and her mother what *Mr. Smits,* the defendant named, had done to her.' By the court: 'If it is confined to what he did, that he has a right to state.' Exception taken."

Of course error must be made to appear affirmatively by the record. Now we do not know by the record what the district attorney's statement was to which objection was made. It is undoubted law that the fact that the injured female made early complaint is always admissible, but the particulars of the complaint are not admissible except in a

case where the person ravished is very young. *Hannon v. State,* 70 Wis. 448, 36 N. W. 1. Just what particulars the district attorney stated he expected to prove here does not appear from the record. When the evidence of complaint was introduced no particulars were given, nor did the witnesses state that the complaining witness named the defendant as the guilty party. So if it be admitted that it is not competent to prove that the assaulted female named the person in her complaint, still we have no error actually shown to have been committed here, for no evidence of that kind was received, and the record does not even tell us with any certainty that the district attorney stated that it would be offered. There is some divergence of authority upon the question suggested; the weight of authority seeming to be against the reception of such evidence and confining the proof simply to the fact of complaint without details and without the name of the accused party. There are, however, jurisdictions where it is held that the name can be given. 10 Ency. of Ev. 587, 588, and notes. This court seems not to have met the proposition directly and we do not now decide it, but hold that upon the showing here made no prejudicial error appears in any event.

The accused requested the court to instruct the jury that if they found there was no penetration of the female organ they might find the defendant guilty of assault with intent to commit rape, but the court refused to give the instruction or its equivalent. This refusal is alleged as error. The fact that there had been penetration of the female organ of the prosecuting witness at about the time of the alleged rape was conclusively established; furthermore, it was not suggested on the trial or in this court that the penetration had been accomplished by any other person or agency than that claimed by the state. The evidence had made it certain that whoever committed the assault succeeded in accomplishing pene-

tration, hence there was no room for a finding that the defendant had committed an assault with intent to penetrate but had failed in accomplishing his purpose. Either he was guilty of rape or was entirely innocent.

It is contended that sec. 4580, Stats. (1898), as amended by ch. 296, Laws of 1907, is so far inconsistent with the provisions of sec. 4382 as to amount to a practical repeal of the last named section, or, if not, then that it demonstrates that there was no intent on the part of the legislature that the crime of rape upon a girl under fourteen years of age should be punished so severely as has been the case here. The bearing of sec. 4580 on the rape statutes was fully considered in *Loose v. State,* 120 Wis. 115, 97 N. W. 526, and it seems unnecessary to add anything further here. It was there held that both statutes could stand together, applying to sexual offenses not differing perhaps in the physical act but widely differing in their moral enormity. The amendments of 1907 contained in ch. 296 and ch. 653 of the laws of that year do not affect the conclusion there reached.

It is argued that the punishment in the present case is cruel and unusual. The original statute of this state punished rape upon a girl under the age of consent with imprisonment for life (R. S. 1849, ch. 133, sec. 40), and the punishment so remained for many years. It is true that the age of consent was raised by ch. 193 of the Laws of 1887 to fourteen years, but the limit of punishment was not changed until 1889, when by ch. 368 of the laws of that year the present punishment was inserted in place of imprisonment for life.

It is true that under this statute the punishment may be very severe and we can readily imagine cases where, if the extreme limit of imprisonment or any term nearing that limit were imposed, it might well be condemned as cruel and unusual. In the present case, however, while the sentence is severe, we are unable to say that the punishment inflicted is

so disproportionate to the gravity of the crime as to offend against the constitutional inhibition against cruel and unusual punishments.

By the Court.—Judgment affirmed.

STATE EX REL. GREELEY, Appellant, vs. JOINT FREE HIGH SCHOOL DISTRICT OF THE TOWN OF WATERFORD AND VILLAGE OF WATERFORD and others, Respondents.

February 25—March 14, 1911.

Schools: Free high school districts: Dissolution: Statute construed.

Sec. 490*a*, Stats. (Laws of 1907, ch. 588), relating to dissolution of free high school districts, applies to high school districts formed under sec. 490 (Laws of 1909, ch. 217), but not to joint free high school districts formed under sec. 491 (Supp. 1906).

APPEAL from a judgment of the circuit court for Racine county: W. J. TURNER, Judge. *Affirmed.*

This is an appeal by the plaintiff from a judgment dismissing the complaint on the ground that it fails to state facts sufficient to constitute a cause of action. The suit is in the nature of *quo warranto* to try the right of the defendants *William Sanders* and *Anna E. Bennett* to exercise the franchises and powers of the offices of clerk and director, respectively, of a joint free high school district of the town and incorporated village of Waterford in Racine county. The ground of attack is that the district was dissolved by vote at the annual election in April, 1910, and this question turns upon the validity of the vote cast and whether sec. 490*a*, Stats. (Laws of 1907, ch. 588), applies to joint free high school districts established under sec. 491, Stats. (Supp. 1906).

For the appellant there was a brief by *J. E. Dodge,* of

counsel, and *George W. Waller* and *Simmons & Walker,* attorneys, and oral argument by *Mr. John B. Simmons* and *Mr. Waller.*

For the respondents there was a brief by *Hand & Hand* and *Kearney, Thompson & Myers,* and oral argument by *E. B. Hand* and *W. D. Thompson.*

KERWIN, J. It is conceded by counsel for appellant that only by express statutory provision can dissolution of the district in question take place; and that none exists except it can be found in ch. 588, Laws of 1907, incorporated into the general statutes as sec. 490*a,* which provides:

"The electors of any town, village or city school district or subdistrict maintaining a free high school, may at any annual meeting or election, vote upon the question of surrendering the certificate of organization of the free high school and the dissolving of the high school district. . . . The vote shall be taken by ballot and canvassed according to the statutes for conducting elections in such municipality. Those ballots in favor of the surrendering of the certificate and dissolution of the free high school district shall be written or printed 'for surrender,' those opposed 'against surrender.' "

The first question presented under this statute is, Does it apply to joint school districts formed under sec. 491, Stats. (Supp. 1906), or does it apply solely to districts established under sec. 490? Sec. 490, Stats. (Laws of 1909, ch. 217), provides that any town, village or city, school or subdistrict which contains within its limits an incorporated village or which has a graded school of not less than two departments may establish and maintain not exceeding two high schools in the manner and with the privileges therein provided. The section further provides that the question of establishing such school may be submitted to a vote and that the vote shall be taken by resolution, and if the resolution be adopted "such town, district, subdistrict, village or city shall constitute a high school district."

Sec. 491, Stats., as amended (Supp. 1906), provides for the formation of a "joint free high school district" by two or more adjoining towns or school districts, or one or more towns or school districts and an incorporated village or city when the same together will make a district of contiguous territory. The statute provides for the submission to the electors by resolution and that the resolution shall not be adopted unless a majority of the votes cast in each such town, school district, city, or village be in favor of it. Sec. 491 makes express provision for a case like the one before us. It provides:

"The creation of a new town or incorporation of a village out of the territory included in a free high school district shall not dissolve nor otherwise affect such district but such towns or town and village shall thereafter constitute a joint high school district."

It will be seen that the statutes, secs. 490 and 491 as amended, make provision for two classes of free high schools, the latter under sec. 491 denominated a joint high school district, and while there are many provisions of the statute under the head "Free High Schools," which embrace secs. 490 and 491, common to both classes of free high schools, the two classes of schools are nevertheless designated by the statute as separate, the joint free high school district under sec. 491 being a class by itself. This is apparent by the terms of sec. 490*a*, which seems to apply exclusively to high school districts designated in sec. 490.

The complaint alleges that the defendant joint free high school district comprises the entire territory of the town of Waterford and village of Waterford in the county of Racine; that said joint free high school district was originally organized under the laws of Wisconsin as a township free high school district, and that afterwards the village of Waterford was duly incorporated as a village out of the territory in said free high school district, which thereupon became a joint high

school district consisting of the town of Waterford and the village of Waterford under sec. 491, Stats., as amended.

The complaint further alleges proceedings to dissolve under sec. 490*a*, Stats., and the question is whether said last named statute authorizes the proceeding to dissolve a joint free high school district. The question is argued at length by counsel for respondent as to whether the legislature has the right to authorize the dissolution of a free high school without providing for the education of the resident youth of the district. We do not find it necessary to consider this proposition, because we think sec. 490*a* does not apply to joint high school districts established under sec. 491, Stats.

Ch. 588, Laws of 1907, designated sec. 490*a*, immediately follows sec. 490, and by its terms shows that it was intended to provide for the dissolution of school districts described in sec. 490 and does not include school districts described in sec. 491. The language of sec. 490*a* heretofore set out applies specifically to the districts specified in sec. 490 and cannot by any rules of construction be said to include the joint school districts specified in sec. 491, Stats.

But it is argued by counsel for appellant that under the subchapter "Free High Schools" and comprising secs. 490 to 496*c*, many of the sections are obviously applicable to all high school districts indiscriminately. A careful examination of the sections applicable to all schools in the subchapter we think will show that the respective sections are made by the language used applicable to the schools designated under both sections. For example, sec. 491*a* refers directly to free high schools maintained as "provided in secs. 490 and 491." And sec. 491*b* refers back to sec. 491*a*. Sec. 492, relating to school officers, refers to the officers of "each free high school district," and the section also mentions "joint districts," showing that the section has relation to both classes of districts. The statutes, secs. 490 and 491, expressly provide for the two classes of school districts, while sec. 490*a* has

reference by its terms to the school district referred to in sec. 490, and by its terms in no way includes the joint school district specified in sec. 491.

We must therefore hold that sec. 490 does not authorize the dissolution of a joint high school district established under sec. 491.

Other questions discussed need not be treated.

By the Court.—Judgment appealed from is affirmed.

SMITH, Plaintiff in error, vs. THE STATE, Defendant in error.

February 25—March 14, 1911.

Criminal law: Appeal and error: Review: Verdict: Exceptions: Depositions on behalf of accused: Use by state: Waiver of constitutional rights: Nonprejudicial errors: Evidence: Relevancy.

1. The rule that the finding of a jury must be regarded as a veritv on appeal if in any reasonable view of the evidence such a conclusion could have been arrived at, applies to verdicts in criminal cases.
2. Where objection to use by the state of a deposition taken on behalf of the accused was not insisted upon at the trial, and no exception was taken to the ruling permitting such use, the objection is not available on writ of error.
3. A deposition taken on behalf of accused and placed and left on file, whether offered by him or not, may be used against him—he having to that extent waived his right to meet the witness face to face.
4. The defendant in a criminal action may waive any right except his right to a trial by twelve jurors.
5. Under sec. 2829, Stats. (1898), no judicial determination, whether in a civil or criminal case, will be disturbed on purely technical grounds, or on any grounds not substantially and unjustly affecting the party complaining, unless the written law so provides.
6. The question whether evidence offered to show guilty intent could reasonably be considered as tending to prove such intent is largely a matter of judgment, and a ruling of the trial court thereon will not be disturbed except for manifest error.

ERROR to review a judgment of the circuit court for Sheboygan county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

Plaintiff in error was informed against as having, at a place and time named, while acting as agent of E. B. Garton, and not the latter's apprentice nor under sixteen years of age, been intrusted, as such agent, with a certain certificate of corporate stock of the value of $1,000, for sale thereof and, being so intrusted, of having feloniously taken and carried away said property intending to fraudulently convert it to his own use.

The information contained all formal requisites and purported to charge an offense under sec. 4418, Stats. (1898). He was tried on the issue of not guilty, convicted, and sentenced to state prison for two years.

Theo. Benfey, for the plaintiff in error.

For the defendant in error there was a brief by the *Attorney General, A. C. Titus,* assistant attorney general, and *W. B. Collins,* district attorney, and oral argument by *Mr. Collins.*

MARSHALL, J. Counsel for plaintiff in error present some nineteen assignments of error for consideration. All may be sufficiently considered in a few groups and with brief discussion.

It is first suggested the evidence does not sustain the verdict. Under the rule that the finding of a jury must be regarded as a verity on appeal if in any reasonable view of the evidence such a conclusion could have been arrived at, the one before us cannot be disturbed unless some prejudicial error of law was committed. That rule applies to verdicts in criminal cases as well as in civil cases.

It is further suggested the circuit court erred in permitting depositions taken on behalf of the accused to be used against him. There are at least two efficient answers to that suggestion.

It does not appear that objection to use of the depositions on behalf of the state was insisted upon, or any exception taken to the ruling of the court in that regard. There was considerable discussion when the case was being made in chief as to whether depositions could be used, properly, against a defendant in a criminal action till offered in his behalf, ending by an agreement, subject to conditions not material here, that the direct examinations, in due course, should be read on behalf of the accused, subject to such objections as might then be made, and that the state's attorney might then read such of the depositions as he might choose to, subject to such objections as to relevancy as counsel for the accused should then make. Leading up to this agreement the latter's counsel made some objections, raising however only the question of whether a deposition taken by one party can be used by his adversary in advance of its having been offered in his own behalf. Some rulings were made respecting such objection, to the effect that no part of a deposition can be excluded upon an offer to use it by the party adverse to the one in whose behalf it was taken, solely on the ground of its competency for the former being dependable upon whether the latter sees fit to use it and to the extent of such use. The court overruled the objection, holding that if one party to an action takes a deposition for use on the trial, places it on file, and fails to withdraw it properly before trial yet does not read it in evidence, any part thereof which the opposite party may desire to read, he can offer subject to objection, as if the witness were present testifying. No exception was taken to such ruling. Thus it will be seen that no question as to the competency of the depositions in question was preserved for review.

Notwithstanding the question of competency was waived, as we have seen, we may well observe that if it were otherwise the result would be the same. The ruling on the particular point presented to the trial court is sustained by *Juneau Bank v. McSpedon,* 15 Wis. 629, and *Hazleton v. Un-*

ion Bank, 32 Wis. 34; *Maldaner v. Smith,* 102 Wis. 30, 78 N. W. 140.

It is suggested that the accused, by the court's rulings, was deprived of his constitutional right to meet the witnesses face to face. No objection was made at the trial on that specific ground. If it could be efficiently claimed the objections interposed were broad enough to include such ground, no exception was saved to the rulings. The accused was competent to waive his constitutional right. One so circumstanced can waive any right he may have quite as freely as in a civil case. That rule only stops short of competency in a criminal case to waive the right to a trial by twelve jurors. Even that exception exists by deference to early decisions which the court in recent years has not thought best to disturb. *Jennings v. State,* 134 Wis. 307, 114 N. W. 492; *Okershauser v. State,* 136 Wis. 111, 116 N. W. 769; *Hack v. State,* 141 Wis. 346, 124 N. W. 492; *Oborn v. State,* 143 Wis. 249, 126 N. W. 737. In the latter case it was said, referring to many previous ones, the doctrine of waiver as applied to a criminal case is a very broad one, quite as broad as in civil cases.

"No limit has yet been found in this court to the competency of an accused person in a criminal case to waive irregularities or rights, except the single instance,—one of disability in a capital case to waive the right of trial by twelve jurors."

It follows, logically,—from the doctrine that a deposition taken at the instance of one party and found on the court files at the time of the trial may be used by his adversary, regardless of whether offered by the former or not, and the settled doctrine of waiver,—that if an accused person sees fit to cause a deposition to be taken in his behalf and made a part of the court files existing at the time of the trial, he thereby waives his constitutional right to meet the witnesses face to face, so far as otherwise his adversary would be precluded from using such deposition whether offered by him or not.

There are authorities elsewhere contrary to the foregoing, but they need not be referred to since this court has, really, long since taken its position in respect to the matter. The general policy as to depositions was adopted for this state in *Juneau Bank v. McSpedon, supra,* and has since been steadfastly adhered to, a choice being made between conflicting authorities, the court taking the one most adaptable to the system of our Code, rounded out as it is by the general declaration contained in sec. 2829, Stats. (1898), which has been repeatedly held to apply to criminal as well as civil cases. Under that policy, progressive, as it ought to be, in the direction of the sensible and practicable, no judicial determination can be disturbed upon purely technical grounds, or any not substantially unjustly affecting the party complaining, except in situations, if there be any, where the hands of the court may be tied by written law, actually or by due deference to legislative will.

A group of assignments of error are predicated upon the claim that evidence offered to show guilty intent had no relevancy to that end. The objection, primarily, presented in each instance a question of competency. If the purpose of the evidence was legitimate and in any reasonable view it might have had some appropriate efficiency with the jury, it was competent and relevant. That the purpose was legitimate is not doubted. Whether the evidence could reasonably be considered as tending appropriately was largely a matter of judgment. In such situations it requires a case of manifest error to warrant this court in disturbing the ruling of the circuit judge. *Spick v. State,* 140 Wis. 104, 118, 121 N. W. 664. No such manifest error appears as to any such ruling in this case to which our attention has been called.

The foregoing covers all matters which seem to have sufficient merit to warrant their being referred to more than to suggest that they have not been overlooked.

By the Court.—Judgment affirmed.

McMillan and another, Administrators, Appellants, vs. Holley and others, imp., Respondents.

February 2—March 14, 1911.

Trusts: Construction of agreement with creditors: Implied direction as to surplus: Evidence: Parol proof of extrinsic facts.

1. Where a trust agreement providing for a conveyance of property for the payment of debts of the grantors, but containing no express provision for the return to them of any surplus, left it doubtful what the intent of the grantors was in that regard, it was proper to receive and consider extrinsic evidence as to the facts and circumstances surrounding the parties at the time of its execution in order to arrive at its proper construction.
2. Where such agreement on the one hand recited that the grantors had "ample property" to pay their debts if it were not sacrificed, mentioned the "services of the trustees" as part of the consideration of the transfer, directed that the trustees continue the business until a certain date "unless the debts be sooner paid," provided for an annuity to be paid one of the grantors during the closing of the estate, and in the certificate of acknowledgment referred to the trustees as "trustees for the said parties and their creditors;" but on the other hand called said trustees in the body of the agreement "trustees for the creditors," absolutely discharged the personal liability of the debtors in consideration of the transfer, provided for calling a meeting of creditors to "realize and divide the estate," and required that the books and accounts of the trustees should be at all times open to creditors, not mentioning the debtors, it is *held*, upon extrinsic proof showing that no surplus was anticipated by at least one of the debtors at the time of making the agreement, and that both had considered the subject of providing in the agreement for the disposal of any surplus but omitted it from the final draft, that the trial court properly found the conveyance to be absolute for the benefit of the creditors alone, and that there was no trust for the grantors.
3. In such case the trustees having, for lack of purchasers, conveyed the residuum of the property to a corporation organized by the creditors for the purpose of taking title thereto, neither the trustees nor such corporation was under obligation to account to the debtors in respect to the property so conveyed, although by the return of better times and the general improvement of business it increased largely in value.

APPEAL from a judgment of the circuit court for La Crosse county: JAMES O'NEILL, Judge. *Affirmed.*

This is an action in equity brought by the administrators of the estate of Alexander McMillan to charge the defendants *John M. Holley, E. C. Warner,* and one W. W. Cargill (now deceased) as trustees for the plaintiffs, to compel an accounting of the trust property, and to set aside conveyances made by said defendants to the *McMillan Company,* a corporation, which is also joined as a defendant. The answer denied the existence of any trust. The action was referred to C. L. Baldwin, Esq., to hear, try, and determine. The facts were not seriously disputed.

Prior to December, 1896, the firm of D. D. McMillan & Sons, composed of D. D. McMillan, John H. McMillan and William McMillan, owned and operated a number of elevators in Texas. Alexander McMillan owned considerable real property in La Crosse and elsewhere. Both Alexander and the firm were largely in debt, Alexander's individual indebtedness being mostly secured by mortgages upon real estate. He had also indorsed the notes of D. D. McMillan & Sons to a large amount, and the total indebtedness, secured and unsecured, amounted to about $190,000. In November, 1898, the parties were unable to proceed in business, and after some negotiation entered into an agreement with all of their creditors by which they turned over all of their property to *Holley, Warner,* and Cargill as trustees, which agreement, after the preliminary clause, reads as follows:

"Whereas, the said firm of D. D. McMillan & Sons is largely indebted in various amounts at this time to certain of said several creditors, and said D. D. McMillan and Alexander McMillan are indebted to others of said several creditors, and have also become contingently liable by indorsement and guarantee for debts of said D. D. McMillan & Sons, and said firm as principal debtor and said D. D. McMillan and said Alexander McMillan as principal debtors, and as indorsers and guarantors, as aforesaid, are not able at this time

to pay and discharge the demands of said creditors, *but have ample stock in trade, property and effects for that purpose if the same can be converted without sacrifice, and it is believed that said debts can be paid if the business of said firm can be continued with free use of the property and resources now in the hands of said firm, in the manner hereinafter provided.* Now this agreement witnesseth that in consideration of the forbearance of suit by each of the creditors, *and the release on their part hereinafter contained and of the services to be performed by said trustees as hereinafter set forth,* the said firm of D. D. McMillan & Sons and each and every member of said firm hereby assigns and transfers in trust to said trustees all personal estate of every kind and nature, and all notes, claims, demands, book accounts, and effects of every name and description belonging to said firm wherever situated, and the business, name and good will of said firm, and authorize and empower them forthwith upon and after the execution of this agreement to take possession of all such personal property, effects and business *and to continue said business under their own names as trustees for said creditors for the length of time and subject to the conditions hereinafter set forth,* and for the same considerations aforesaid, said firm of D. D. McMillan & Sons will forthwith upon and after the execution of this agreement convey to said trustees upon the same trusts all real estate and interest in real estate wherever situate belonging to and used by said firm whether held in the name of said firm or in the name of any member thereof, and for the same considerations aforesaid, said D. D. McMillan will forthwith upon and after the execution of this agreement convey and transfer to said trustees upon the same trusts all the following described real estate and personal property:

[Description of property.]

"D. D. McMillan & Sons' property:

[Description of property.]

"And for the same consideration aforesaid said Alexander McMillan will forthwith upon and after the execution of this agreement, convey and transfer to said trustees, upon the same trusts, all the following described real estate and personal property:

[Description of property.]

"It is expressly understood and agreed that this agreement

shall be of no force and effect unless said conveyances and transfers from said firm and from D. D. McMillan and Alexander McMillan shall be fully executed and delivered to said trustees on or before the 10th day of January, 1897.

"*Said trustees shall hold, manage and control all of said real and personal property so to be conveyed and transferred to them with power to lease said real estate and collect and employ rents as hereinafter provided, and shall continue the business heretofore carried on by the said firm of D. D. McMillan & Sons until the first day of January, A. D. 1900,* unless the debts of said firm shall be sooner fully paid, or unless the said trust shall be sooner terminated in the manner hereinafter provided. They shall keep said property in good condition and repairs, keep all insurable portions thereof insured against fire or other damage to the extent, at least, that the same is now insured, or more in their discretion, distribute and pay over the net profits of said business and net proceeds of rents and all other income from said property and business among and to said creditors *pro rata* according to the amounts of their several demands, *and in fixing the amount of said several demands for purposes of such distribution they shall add to the face of each claim the interest thereon accrued and unpaid up to January 1st, 1897;* and it is expressly understood that such *pro rata* payments of net proceeds shall be applied in extinguishment of interest accrued up to the date of each payment, and in case of deficiency in the amount to pay all accrued interest, interest accrued upon any indebtedness secured by mortgage, pledge or hypothecation now in force, shall be first paid in full, and if there should be any deficiency in the amount required to pay such mortgage interest, payments shall be made on account of interest upon secured indebtedness *pro rata* according to the several principal amounts.

"*And it is further hereby agreed and declared, that if at any time prior to said first day of January, 1900,* the said trustees shall be of the opinion that having regard to the condition and prospect of the business of said debtors so continued by them it would be expedient forthwith to wind up the same and realize *and divide the estate,* they shall call a meeting of said creditors by circular letter, stating the time, place and object of the meeting, and sent by post or otherwise to the last known place of abode or business of such creditors, re-

spectively, or their respective agents, in time to give to said creditors or agents fifteen clear days' notice of such meeting; and if at such meeting a majority in number representing three fourths in value of the creditors present or represented at the meeting shall resolve that the said business and estate be wound up and realized, then the trustees shall, with all convenient speed, proceed to wind up the said business, and to sell, collect, and realize the said estate, and apply the net proceeds thereof first in the payment of all debts secured by mortgage in the order of legal preference, *and the remainder pro rata as aforesaid upon unsecured claims. If all the said debts shall not have been fully paid on or before January 1st, 1900,* and the said creditors shall not on or before that date have consented in writing to a further extension of said trust and continuance of said business in the manner and for the purpose herein provided, it shall then be the duty of the said trustees to proceed as aforesaid to wind up the said business and to sell, collect and realize said estate and apply the *net proceeds as hereinbefore provided,* and all provisions of this agreement as to control and management and power of sale of and over all the property of said estates shall be continued in force for such length of time after January 1st, 1900, as may be necessary for the purpose of winding up the estate. *Full power and authority is given hereby to said trustees in their discretion to sell and dispose of any of the property, real or personal, conveyed and to be conveyed to them pursuant to the provisions hereof, which in their opinion is not necessary or useful in the further prosecution of the business, and to use and apply the net proceeds thereof* in the same manner hereinbefore provided for the use and application of the net profits of said business, and *in consideration of the premises the creditors hereby respectively release said debtors, their heirs, executors and administrators from the said debts due to them respectively, and from all liability as indorsers or guarantors, and from all actions, proceedings, claims and demands in respect thereof.* Provided, however, and it is hereby agreed and declared, that these presents, and the release hereinbefore contained, shall not in any wise prejudice or affect the rights or remedies of any of the said creditors against any surety or sureties other than said Alexander McMillan and D. D. McMillan, or any person or persons other than the debt-

ors, their heirs, executors or administrators, and that no pledges, mortgage or hypothecation of any of the property hereinbefore mentioned as conveyed and transferred, or to be conveyed and transferred to said trustees shall be deemed to be released or discharged, or in any manner impaired, except by payment in full of the indebtedness secured by said pledge, mortgage, or hypothecation; and at and after the time of the termination of the trust herein provided for or of any agreed extensions thereof or of its termination by vote of three fourths in value of the creditors as hereinbefore provided for, the holder of any such pledge, mortgage or hypothecation may proceed to enforce the same for any then unpaid portion of the indebtedness secured thereby. And it is further agreed that the books and papers of said business to be continued by said trustees and all books and accounts of and relating to the management of said entire trust estate shall be open at all times in proper business hours to examination by any of said creditors, or by any committee whom they may appoint for that purpose.

"In consideration of the fact that said Alexander McMillan is only liable contingently and as an indorser for the indebtedness of said firm of D. D. McMillan & Sons and that this agreement provides for the conveyance to said trustees of all the productive property of said Alexander McMillan, *it is hereby further agreed that said trustees shall and may pay over from time to time to said Alexander McMillan out of the proceeds of rentals or other income derived from the property conveyed by said Alexander McMillan pursuant hereto a sum or sums not exceeding in the aggregate two thousand dollars ($2,000) per annum.*

"A majority of said trustees shall have power to do any act required to be done in the execution of this trust."

This agreement was duly signed, sealed, and acknowledged by the grantors, the trustees, and the creditors.

In January, 1897, the trustees took possession of all of the property and commenced its administration. They sold the Texas elevators and some other property and made payments upon the claims. In September, 1897, they were threatened with suit by the receiver of the National Bank of Illinois,

which had a claim of $10,000 face value, and the trustees purchased the claim for one third of its face, each trustee furnishing $1,111.11, and taking an assignment of one third of the claim. March 1, 1900, the outstanding unsecured claims with interest amounted to more than $62,000, held by eight claimants, three of whom were the trustees and held the following amounts, respectively: State Bank of La Crosse (represented by *John M. Holley*), $18,200; W. W. Cargill, $13,100; and *E. C. Warner,* $13,500. The balance was held in smaller sums by five other claimants. There were also notes outstanding given by the trustees to pay off mortgages and to defray operating expenses of $19,500, unpaid bills for expenses of $2,153.65, and a mortgage indebtedness on the McMillan building in La Crosse of $25,000, making a total of $109,103.65. The property then left in the hands of the trustees consisted almost entirely of real estate which had been owned by Alexander McMillan in the city of La Crosse, including the McMillan building, together with some acreage property at St. Paul, Minnesota, and it was arbitrarily valued at $109,103.65 in order to equal the total claims. The trustees then attempted to dispose of the property and close out the trust, but after advertising in the newspapers and employing real-estate men for some time without success they concluded that the best and perhaps the only feasible way to close out the matter was for the creditors or claimants remaining to form a corporation capitalized at $62,000, and each claimant to take stock to the amount of his claim and then transfer the remaining property to the corporation. The claimants all agreed to this plan, and a corporation called the *McMillan Company* (one of the defendants) was formed and the plan carried out. Under the view taken of the case by the court it is unnecessary to go into the facts subsequently occurring.

The referee found that the trust agreement created not merely a trust for the creditors but a trust for the grantors, in

that in legal effect it provided that in case the debts were fully paid at any time the residuum was to be returned to the grantors. Hence he concluded that the trustees could not convey the property to the *McMillan Company,* of which they owned a large majority of the stock, and that such conveyance must be set aside and an accounting must be had to ascertain whether or not there was any surplus of property in the hands of the trustees after the payment of the claims. The circuit court, however, came to the conclusion that the agreement in question created no trust in favor of the grantors, but was an absolute conveyance in favor of the creditors; that the sale to the *McMillan Company* was a valid sale; and that the plaintiffs were barred from relief in any event by laches and acquiescence. The complaint was thereupon dismissed on the merits, and the plaintiffs appeal.

For the appellants there was a brief signed by *A. E. Bleekman* and *Bunge & Bosshard,* and oral argument by *George W. Bunge* and *A. E. Bleekman.* They contended, *inter alia,* that in trusts for the payment of debts there is always an implied direction to the trustee to return any surplus, and defendants were liable to account. *Farnsworth v. Doom,* 22 Ky. Law Rep. 1491, 60 S. W. 712; *Atwater v. Manchester Sav. Bank,* 45 Minn. 341, 12 L. R. A. 741; *Quimby v. Uhl,* 130 Mich. 198, 89 N. W. 722; *Geisse v. Beall,* 3 Wis. 367; *Nodine v. Wright,* 37 Oreg. 411, 61 Pac. 734. The sale to the *McMillan Company* was in fact to the trustees themselves, and void at plaintiffs' election. *Harrigan v. Gilchrist,* 121 Wis. 127, 363, 99 N. W. 909; *Rowell v. Rowell,* 122 Wis. 1, 13, 99 N. W. 473; *King v. Remington,* 36 Minn. 15, 29 N. W. 352; *Frazier v. Jeakins,* 64 Kan. 615, 57 L. R. A. 578; *Cook v. Berlin W. M. Co.* 43 Wis. 433; *Wing v. Hartupee,* 122 Fed. 897, 900; *Munson v. S., G. & C. R. Co.* 103 N. Y. 58, 74; *Ludington v. Patton,* 111 Wis. 208, 86 N. W. 571; *Hayes v. Hall,* 188 Mass. 510, 74 N. E. 935; *Michoud v. Girod,* 4 How. (45 U. S.) 503.

For the respondents there was a brief by *Woodward & Lees,* and oral argument by *G. M. Woodward.* They cited, among other cases, *Nevius v. Nevius,* 117 App. Div. 236, 101 N. Y. Supp. 1091; *Selden v. Vermilya,* 3 N. Y. 525; *Cooke v. Smith,* L. R. 45 Ch. Div. 38, 1 App. Cas. [1891] 297; *Patterson's Appeal,* 118 Pa. St. 571; *White v. Glover,* 59 Ill. 459; *Gibson v. Gains* (Ky.) 28 S. W. 781; *Hackett v. Hackett,* 67 N. H. 424; *Duval's Appeal,* 38 Pa. St. 112; *Mansfield v. District Agr. Asso.* 154 Cal. 145, 97 Pac. 150; *Stitzer v. Whittaker,* 3 Neb. (Unof.) 414, 91 N. W. 713; *Lewis v. Welch,* 47 Minn. 193, 199; *Fleming v. McCutcheon,* 85 Minn. 152, 88 N. W. 433.

WINSLOW, C. J. The fundamental question in this case is the question as to the proper construction of the agreement of December 1, 1896. Is it an absolute conveyance in trust for the benefit of the creditors alone, or is there a trust also reserved in favor of the grantors in case the claims of creditors be fully paid and a surplus of property remain in the hands of the trustees? The question is by no means free from difficulty. There is no clause in the agreement expressly providing that in case there be a residuum of property it shall be returned to the grantors, but the argument of the plaintiffs is that such a provision is necessarily to be implied from other clauses, and this conclusion was reached by the referee in an able opinion which is returned with the record.

The argument in this behalf starts with the proposition that if a grant of property is made in trust for a specified purpose, when that purpose is fully accomplished and there is property remaining undisposed of it necessarily belongs to the grantor. Certain clauses in the agreement are there cited and relied upon as showing that the parties contemplated that there would be a residuum of property after all claims were paid which was to be returned to the grantors. The features of the trust agreement so relied upon are the following:

(1) the recitation that the grantors have "ample" property to pay their creditors if it be not sacrificed and if the business can be continued with free use of the property; (2) the statement that "the services of the trustees" form a part of the consideration for the transfer, the argument being that if the transfer be absolute and in trust for creditors only, then the trustees will perform no services for the grantors which could be any part of the consideration; (3) the direction that the business shall be continued until January 1, 1900, "unless the debts of the firm be sooner paid," indicating that it was contemplated that the business might be profitable enough to pay the debts, thus leaving the property intact and involving the absurdity of supposing that in such case the property was expected to go to the creditors also; (4) the fact that Alexander McMillan was given an annuity to continue apparently only during the closing out of the estate, and the creditors were at the same time given power to close out the estate within the first year, thus ending the annuity, it being argued that it is unreasonable to suppose that Alexander McMillan would consent to any such arrangement if there was to be no surplus to be returned to him when his annuity was thus ended; (5) the fact that in the certificate of acknowledgment the officer recites that there appeared before him the grantors, naming them, "to me well known to be the persons named in and who signed and executed the foregoing agreement for the appointment of W. W. Cargill, *John M. Holley,* and *E. C. Warner* as trustees *for the said parties and their creditors,*" it being argued that this is an express recognition of the fact that the trustees are trustees for the grantors as well as for their creditors.

On the other hand, the defendants, in support of their contention, rely upon the following features of the agreement: (1) that there is no express provision directing the return of any surplus to the grantors, or even recognizing the possibility of the existence of a surplus; (2) that the trustees are called

"trustees for the creditors" in the agreement, not trustees for all parties; (3) that the debts are absolutely discharged by the creditors, thus indicating that the creditors accepted the property not as collateral security but in payment of their debts; (4) that in the clause empowering the trustees to call a meeting of creditors prior to January 1, 1900, to consider what should be done, the words "realize and divide the estate" are used, indicating clearly that it was considered the estate of the creditors, to be divided among them if they chose, and not a fund to be applied in payment of debts and out of which there might be a balance to be returned to the grantors; (5) the books and accounts of the trustees were to be open at all times to the inspection of the creditors but not to the grantors.

It must be admitted that after all is said that may be said concerning the various provisions of the agreement, the fact that the parties made absolutely no provision for the return of a surplus to the grantors in an agreement which quite elaborately provided for all other contingencies is very difficult to explain upon the hypothesis that they contemplated that there would be a surplus to be returned. The most that can be said in appellants' favor from the wording of the various provisions of the agreement, taken in connection with the entire absence of any special provision for the return of any surplus, is that it seems doubtful upon the face of the paper what the intent of the grantors was in this regard.

If this be the situation, then a case is presented where it becomes proper and even necessary to consider the facts and circumstances surrounding the parties at the time of the execution of the agreement in order to arrive at its proper construction. Some very important testimony along this line was received by the referee, and was rightly considered of great significance by the circuit judge in the very helpful opinion which he filed when deciding the case.

Mr. G. M. Woodward of La Crosse was a creditor of Mc-

Millan & Sons to the amount of $4,000, and when the firm was in financial straits in November, 1896, D. D. McMillan and his son, *John McMillan,* consulted Mr. Woodward as to the best arrangement to be made to prevent sacrifice of the property, and get it in shape so that creditors might be paid. Mr. Woodward testifies as follows:

"D. D. McMillan and I never talked about what would be done in case there was a surplus, over and above the amount of the debts. We agreed if there should be an assignment for the benefit of the creditors and the estate should be closed out in that way probably the creditors would not get more than twenty or twenty-five cents on the dollar. He expected if they would take time enough the property might pay the debts. He and I discussed that somewhat, but I never could see more than fifty or sixty cents in it. D. D. McMillan came in and proposed this paper to me. He suggested the outline, and asked me to look up and see what forms there were that might be used. I took Jones on Conveyances, and a form, I think on page 276, seemed to be the one that would be easiest adapted to the purposes of this trust. That contained the express provision that after the payment of the debts, the surplus, if any, should be returned to the grantors. That was left out of this paper because there was no idea, no thought for a moment that there would ever be anything coming to the grantors. I was satisfied it never would pay and he barely convinced himself that it might pay, so that was left out. The only question was for the creditors that they might get as much as possible out of it, and that the McMillans should be discharged and free from their obligations. November 11th I wrote out a draft of this agreement with a pen. I didn't have it typewritten, because we wanted to keep it a secret. I mailed it to D. D. McMillan. The first draft of this agreement provided for W. W. Cargill as sole trustee. This was handed to D. D. McMillan. Sometime afterward he came back and said they wanted three trustees. He named *Mr. Holley* and *Mr. Warner,* in addition. This agreement was rewritten, putting *Holley,* Cargill and *Warner* as the trustees, and D. D. McMillan went off with it. I don't think any other changes were made.

"He brought it to me subsequently after it had been signed by a number of others. I signed it. I don't remember what date. I understand all the creditors signed it except Leonard Lottridge, who was left out by some oversight. He had a $500 claim against Alexander McMillan, and threatened to garnishee the trustees. He came in by an oral agreement with the trustees. I do not know of any agreement to pay back the surplus in case there was one after the payment of the debts. I only talked with D. D. McMillan."

Reference to Jones' Forms in Conveyancing (2d ed.) pp. 276–279, will show that a part of the form there found contains an express provision of reverter, and that a substantial part of the form was used by Mr. Woodward in the preparation of the agreement in question, but that the reverter provision was not incorporated. This testimony is certainly of much weight and seems to indicate very clearly that the reverter clause was purposely excluded. Mr. Woodward, however, did not see Alexander McMillan, who owned the real estate in question here and whose representatives are bringing this action, and it is quite evident that the testimony quoted has considerably less weight as against Alexander and his representatives. Here, however, another very significant fact develops, and that is that the matter of a reverter was in the minds of Alexander, D. D., *John,* and *Sam McMillan* (the plaintiff) before the execution of the present agreement, and was the subject of discussion with Mr. A. E. Bleekman of La Crosse, who was the legal adviser of Alexander.

This is demonstrated by the testimony of *Sam McMillan,* himself one of the plaintiffs and son of Alexander McMillan. He identified a written memorandum entitled "Outline of Plan of Appointment of Trustee," which was shown to be in the handwriting of *John McMillan* and which he saw in his father's office before the execution of the present agreement. This memorandum provided as follows: (1) All property of Alexander McMillan, D. D. McMillan, and the firm, except exemptions, to be transferred to trustee to manage for the

mutual benefit of all concerned; (2) the idea is to prevent sacrifice of property, pay debts as rapidly as possible, with the idea of such reorganization of the affairs of each as may be possible and satisfactory; (3) creditors to agree to extend time until expiration of trusteeship and consent that trustee may run the business as before; (4) trustee to allow Alexander a proper and sufficient income to be agreed on later; (5) at the expiration of trusteeship all remaining property to be retransferred to Alexander and D. D. McMillan, according to original ownership. *Sam McMillan* further testified that he conversed with his father, Alexander, and with his uncle, D. D. McMillan, about the paper at the time, that they told him it was a general plan, and that they handed it to him and he took it to Mr. Bleekman and asked him what he thought about it.

It will be noticed that the agreement outlined in this memorandum is radically different from the agreement finally made. It contemplated simply a temporary placing of the business in the hands of a trustee, with merely an extension of time for the payment of debts and an ultimate return of the remaining property intact to the grantors. Now it appears that the agreement finally made was considered for some weeks after the first draft and evidently in connection with the memorandum just referred to, but it differed from the memorandum in many ways and in no way more significantly than in its absolute silence as to any retransfer of property at the close of the trusteeship. We cannot escape the conclusion that the omission was deliberate rather than accidental, and that it means that all the grantors had abandoned hope of saving anything out of the wreck and were content to absolutely transfer their property to their creditors in consideration of a release from their overwhelming load of debt. The widespread depression in business at the time of the transfer and for some years thereafter tends to make this conclusion more reasonable, as well as the fact that as late as 1900, when the

trustees attempted to dispose of the real estate, they found no market for it and were practically compelled to take it themselves rather than allow it to be sacrificed. It is common knowledge that real-estate values have advanced much since that time, and it may well be that in the light of present-day values it may seem that the creditors made a good bargain, but the matter must be viewed as it presented itself to the minds of the parties in 1896 and in the light of the business conditions and property values then prevailing.

The conclusion which we reach is that the circuit court was right in holding that no trust for the benefit of the grantors was reserved in the assigned property by the agreement under consideration. Upon this question authorities are of little assistance. It was entirely competent for the grantors and their creditors to agree that the property should be absolutely transferred to the trustees in consideration of a release of indebtedness, and it was competent for them to agree that it should be transferred subject to a reversion of the residue after the creditors had received the amount of their claims. The question as to which plan was adopted depends entirely on the language used in the agreement when given its proper construction, and upon this question decided cases give us no help, because no case has presented this agreement executed under like circumstances. The English case of *Cooke v. Smith,* L. R. 45 Ch. Div. 38, and 1 App. Cas. [1891] 297, approaches the nearest to the present case of the cases cited to our attention, but we have not considered it as at all controlling. Upon the language of the agreement here, construed in the light of the circumstances, we are entirely satisfied that no reverter was intended, and hence the defendants were not trustees for the grantors, and not subject to render any account to them for their acts.

By the Court.—Judgment affirmed.

SCHWEIKERT, by guardian *ad litem,* Respondent, vs. JOHN R. DAVIS LUMBER COMPANY, Appellant.

February 23—March 15, 1911.

Master and servant: Personal injury: Unguarded "gearing:" Statute construed: Evidence: Competency of expert: Line of duty: Contributory negligence: Excessive damages.

1. Upon the question of the practicability of guarding a sprocket wheel attached to the front end of a resawing machine, a factory inspector who had had much experience in examining similar machinery for the purpose of determining its safety, had seen such machinery guarded in factories, and had ordered it guarded in other factories, was fully qualified to testify as an expert.
2. An employee in a sawmill, hired primarily to clean up around a resawing machine and assist in taking away material from it, having been directed by the foreman in charge of the mill to do the work of feeding the machine when the regular feeder wished him to and needed him, was engaged in the line of his duty when injured while obeying such direction.
3. A sprocket wheel and chain used in transmitting power from a shaft to a roller in a resawing machine is within the statute (sec. 1636*j*, Stats. 1898) requiring "all belting, shafting and gearing" so located as to be dangerous, etc., to be securely guarded or fenced.
4. Proof that such sprocket wheel was located just at one side and near the front of the machine and right above the table on which slabs were fed, and was in close proximity to the place where the feeder worked, was sufficient to sustain a finding by the jury that it was so located as to be dangerous to employees in the discharge of their duties.
5. Where the law requires some particular thing to be done by a person to secure the personal safety of others, a failure to perform such duty constitutes actionable negligence at the suit of a person of the class designated who is injured by such failure, without contributory negligence on his part.
6. Evidence showing, among other things, that plaintiff was only eighteen years of age, that he had been employed but a short time in a sawmill, that his work was mainly cleaning up around the saw, that he was not instructed how to feed the machine and had paid little attention to the way others did it, and that having taken the place of the regular feeder he tried to pull a

slab toward the machine, but the slab stuck, and when he pulled harder it came fast and his glove came in contact with the sprocket wheel and drew his hand in,—is *held* to sustain a finding by the jury that he was not guilty of contributory negligence.

7. An award of $2,800 to a young man eighteen years old, for an injury resulting in the loss of the forefinger and partial crippling of the middle finger of the left hand, though regarded as large, is sustained on appeal, the trial court having refused to reduce it.

APPEAL from a judgment of the circuit court for Price county: JAMES WICKHAM, Judge. *Affirmed.*

This action was brought by plaintiff, a minor, to recover damages for personal injuries. The complaint alleges that plaintiff was a minor and inexperienced, and that a sprocket wheel and chain where he was working were unguarded, contrary to law and the duty of the defendant, and that plaintiff was not warned concerning the dangers incident to his work and did not know of them.

The answer puts in issue the allegations of the complaint and alleges that plaintiff was injured while engaged voluntarily in work outside of his employment and contrary to orders; also alleges contributory negligence and assumption of risk. The jury returned the following verdict:

"(1) Was the sprocket wheel on which plaintiff was injured so located as to be dangerous to employees in the discharge of their duties? *A.* Yes.

"(2) Was it practicable, in the efficient operation of the resaw, to securely guard such sprocket wheel? *A.* Yes.

"(3) Would such a guard have lessened the danger, if any, to the plaintiff in feeding the resaw? *A.* Yes.

"(4) Did the defendant fail to exercise ordinary care in failing to securely guard said sprocket wheel? *A.* Yes.

"(5) Was the failure of the defendant to securely guard said sprocket wheel the proximate cause of plaintiff's injury? *A.* Yes.

"(6) Did the defendant's foreman, Oscar Rasmussen, before the time when plaintiff was injured, direct the plaintiff

to feed the resaw whenever he should be requested to do so by the person who usually fed that machine? *A.* Yes.

"(7) Was the plaintiff, at and prior to the time of his injury, inexperienced and ignorant of the dangers incident to the work of feeding the resaw? *A.* Yes.

"(8) If you answer question number 6 'Yes' and also answer question number 7 'Yes,' then did Oscar Rasmussen, at the time of giving such instructions, know that plaintiff was inexperienced and ignorant of such dangers? *A.* Yes.

"(9) If you answer question number 8 'Yes,' then did Oscar Rasmussen fail to exercise ordinary care in failing to warn plaintiff of such dangers? *A.* Yes.

"(10) If you answer question number 9 'Yes,' then was such failure to warn plaintiff of such dangers the proximate cause of plaintiff's injury? *A.* Yes.

"(11) Was the plaintiff, prior to the time of his injury, chargeable with notice that on account of his inexperience he might probably be injured in attempting to feed the resaw? *A.* No.

"(12) Did any want of ordinary care on the part of plaintiff contribute to produce his injury? *A.* No.

"(13) If the court should determine that the plaintiff is entitled to judgment on this verdict, at what sum do you assess the plaintiff's damages? *A.* $2,800."

Motions were made by defendant for nonsuit, directed verdict, for judgment notwithstanding the verdict, to change the answers of the jury in the special verdict and for judgment in its favor on the modified verdict, and for a new trial. These motions were respectively denied and judgment ordered for plaintiff on the verdict, which was entered, from which this appeal was taken.

For the appellant there were briefs by *Barry & Barry,* and oral argument by *J. S. Barry.*

For the respondent there was a brief by *W. H. Frawley & T. F. Frawley,* and oral argument by *W. H. Frawley.*

KERWIN, J. It appears from the record that the plaintiff at the time of the injury was eighteen years old and em-

ployed at work feeding material into a resaw machine which was operated by sprocket chains; that the sprocket wheel on which plaintiff was injured was operated on a shaft at the front of the machine, and in feeding the machine it was necessary to push the slabs which were being resawed under the shaft and sprocket wheel; that the work required close and constant attention; that the sprocket wheel was unguarded; that while plaintiff was so engaged he was injured by having his hand caught in the sprocket wheel. A model of the machine was put in evidence and is before us. The machine consisted of a feed table about two and one-half feet above the floor, in which were live rollers, at the front end of which a dead roller was located, and at the rear end of which was a horizontal bandsaw. A heavy press roll was situate over the table just in front of the saw, which was set into a movable frame, the press roll working up and down to accommodate the thickness of the slabs which were being fed to the saw. This press roll was caused to revolve by means of sprocket wheels and chain, one sprocket being on the press roll and the other located at the front end of the machine. The power came directly from a small shaft which was held between two upright posts located at the extreme front and on either side of the feed table. The shaft was set in boxes placed at the end of the framework which held the press roll. The front sprocket wheel, being the one on which plaintiff was injured, was placed at the left side of the machine, directly above the dead roller and at the front end of the feed table. The operator stood in front of the machine in a space about two and one-half feet between the feed table and a set of rollers on which material was brought to the resaw. At the time of the injury the plaintiff was feeding a slab to the resaw and had his right hand below and his left on the top of the slab and was pulling the slab toward the machine. The slab came rather fast, with a jerk, and caught his hand between the sprocket wheel and slab. He had gloves on, and the

glove caught first between the slab and sprocket wheel and his hand was pulled in.

1. Error is assigned on the admission of the evidence of one T. A. Walby as an expert witness on the question of the practicability of guarding the sprocket wheel, and it is claimed that the witness had not shown himself qualified to testify. The evidence shows that Walby was a factory inspector and had had quite large experience in examination of similar machinery with a view of determining its safety, and testified that he had seen similar machinery in factories guarded, and that such machinery could be guarded, and that he had ordered it guarded in other factories. His knowledge was based upon actual experience in the inspection of sprocket wheels and shafting similar to those in question in factories in northwestern Wisconsin. He was fully qualified to testify as an expert, therefore no error was committed in admitting his evidence. *Kath v. Wis. Cent. R. Co.* 121 Wis. 503, 99 N. W. 217; *Bucher v. Wis. Cent. R. Co.* 139 Wis. 597, 120 N. W. 518; *Miske v. Thom,* 144 Wis. 178, 128 N. W. 858.

2. It is claimed that the plaintiff was not engaged in the line of his duty when injured; that he was employed to clean up around the resaw and assist the regular man in taking away material from it. But there is credible evidence that he was instructed to take the place of the fellows at the saw when necessary, and that the foreman saw him feeding the machine about two hours before he was injured; that the foreman told him to do the work of feeding when the feeder wanted him to and needed him. The plaintiff was corroborated by other evidence, so there is sufficient evidence that at the time of the injury plaintiff was engaged in the line of his duty. The foreman who directed him had charge of the mill and his orders were binding upon the defendant. *Johnson v. Ashland W. Co.* 71 Wis. 553, 37 N. W. 823; *Button*

v. C., M. & St. P. R. Co. 87 Wis. 63, 57 N. W. 1100; *Wagner v. Plano Mfg. Co.* 110 Wis. 48, 51, 85 N. W. 643.

3. As to necessity of guarding the sprocket wheel, if we understand the argument of counsel for appellant correctly they contend that the evidence does not show a case requiring the defendant to guard the sprocket wheel in question, and yet they seem to concede that this court has so held under similar facts. They say, "The question first arises as to whether a sprocket wheel, having a chain running over it, is included within the classification set forth in the statute," and after discussing the definition of "gear" and "gearing" they say, "In fairness, we would add that in two cases that have come to our attention the court has, without dispute, regarded chain wheels as coming within the statute," citing *Klatt v. N. C. Foster L. Co.* 97 Wis. 641, 73 N. W. 563; *Berg v. U. S. L. Co.* 125 Wis. 262, 104 N. W. 60.

The statute (sec. 1636*j*, Stats. 1898) requires that "all belting, shafting, gearing, . . . which are so located as to be dangerous to employees in the discharge of their duties shall be securely guarded or fenced." Under the provisions of this statute and the decisions of this court we think it clear that the sprocket wheel and chain in question came within the classification designated by the statute, and if so located as to be dangerous to employees in the discharge of their duties should be securely guarded or fenced. *Klatt v. N. C. Foster L. Co., supra; Berg v. U. S. L. Co., supra.*

This court has held that, where the law requires some particular thing to be done by a person to guard the personal safety of others, a failure to perform such duty constitutes actionable negligence at the suit of the person of that class injured by such failure of duty without contributory negligence on his part. *Sharon v. Winnebago F. Mfg. Co.* 141 Wis. 185, 124 N. W. 299; *Smith v. Milwaukee B. & T. Exch.* 91 Wis. 360, 64 N. W. 1041; *Stafford v. Chippewa Valley*

E. R. Co. 110 Wis. 331, 359, 85 N. W. 1036; *Van de Bogart v. Marinette & M. P. Co.* 132 Wis. 367, 112 N. W. 443; *Hoffman v. Rib Lake L. Co.* 136 Wis. 388, 117 N. W. 789; *Miller v. Kimberly & C. Co.* 137 Wis. 138, 118 N. W. 536; sec. 1636*j*, Stats. (1898).

The jury found that the sprocket wheel in question was so located as to be dangerous to employees in the discharge of their duties, and that the plaintiff was injured by it without contributory negligence while engaged in the line of his duty. These findings are supported by the evidence and make a case against the defendant.

4. It is further insisted by counsel for appellant that the plaintiff was guilty of contributory negligence as a matter of law. The element of assumption of risk having been removed from the case under the statute, sec. 1636*jj*, Stats. (Supp. 1906: Laws of 1905, ch. 303), which provides in effect that if it appear that the injury was caused by the negligent omission of the employer to guard or protect his machinery or appliances the fact that the employee continued in such employment with knowledge of such omission does not operate as a defense (*Monaghan v. Northwestern F. Co.* 140 Wis. 457, 122 N. W. 1066; *Miller v. Kimberly & C. Co., supra; Klotz v. Power & M. M. Co.* 136 Wis. 107, 116 N. W. 770), the only remaining question under this head is whether the plaintiff was guilty of contributory negligence. The jury found that he was not, and we are convinced that there is ample evidence to support the finding. There is evidence that plaintiff's first employment in a sawmill was the time he went to work for the defendant in July previous to the injury, and that his work was mainly cleaning up around the saw; that he was not instructed how to feed the machine, and that he paid little attention as to how it was done while others were feeding. Moreover, at the time of the injury he tried to pull the slab which he was about to feed into the machine, but it stuck, and when he pulled it harder it came fast and his hand was caught. In view of the boy's age, experience,

and lack of instructions, which there is evidence tending to show, the question of contributory negligence was for the jury. *Keena v. Am. B. T. Co.* 144 Wis. 231, 128 N. W. 858; *Schumacher v. Tuttle P. Co.* 142 Wis. 631, 126 N. W. 46; *Gierczak v. Northwestern F. Co.* 142 Wis. 207, 125 N. W. 436; *Novak v. Nordberg Mfg. Co.* 141 Wis. 298, 124 N. W. 282; *Wankowski v. Crivitz P. & P. Co.* 137 Wis. 123, 118 N. W. 643; *Chopin v. Badger P. Co.* 83 Wis. 192, 53 N. W. 452.

5. It is lastly argued by counsel for appellant that the damages found by the jury are excessive. It is true they are large in view of the extent of the injuries as appears from the evidence. As we view the evidence we would be better satisfied with a smaller verdict. However, the court below on motion for new trial refused to reduce the damages, and after a careful examination of the record we do not feel justified in disturbing the verdict. We think that the findings of the jury have support in the evidence and that no prejudicial error was committed on the trial below.

By the Court.—The judgment of the court below is affirmed.

SHAW, Respondent, vs. CRANDON STATE BANK and another, imp., Appellants.

January 12—April 5, 1911.

Mortgage securing several notes: Priority of lien: Equities: Fiduciary relations: Constructive fraud: Officers of corporations: Banks and banking: Validity of acts: Ratification: Foreclosure: Judgment: Disposition of proceeds of sale: Appeal: Review: Findings of fact.

1. Where a fiduciary acts, in the same transaction, both for himself and for those whom he represents, either as vendor and vendee, obligor and obligee, or releasor and releasee, his acts are voidable at the election of the persons whom he undertakes so to represent, and neither good faith nor fair purpose on his part,

nor valuable consideration paid out by him, will avail to support the transaction against such election.

2. But where the fiduciary deals in good faith with those whom he represents in that capacity, each acting for himself, and parts with a valuable and sufficient consideration, the transaction may sometimes be upheld notwithstanding the fiduciary relation.

3. A finding by the trial court that a fiduciary acted in good faith and was guilty of no actual fraud, is a finding of fact; but a finding, upon undisputed facts, that he was guilty of no constructive fraud, is a mere conclusion of law.

4. So, also, a finding upon undisputed facts that transactions by a fiduciary were ratified by those whom he represented, is a conclusion of law.

5. The president, vice-president, and cashier of a bank, being three of its four directors, were also members of a board of six directors of a manufacturing company, and the vice-president and assistant cashier of the bank were members of the finance committee of said company. The company owed the bank sums aggregating more than half the capital of the bank, partly secured on two tracts of land owned by the company by deeds to the bank and by a trusteeship in which the vice-president of the bank was trustee. Said vice-president individually loaned to the company a large sum of money, and with the other directors of the bank consented that the bank release to the company its existing securities, and that the company execute a mortgage by which said vice-president and also the president of the bank should have liens prior to that of the bank on all the property of the company, including that so released. *Held*, that the transaction so far as it concerned the released property is voidable at the election of the bank and cannot be upheld by proof of good faith or the payment of a valuable consideration by said vice-president to the company; but as to the other property, upon which the bank had no lien, the priority given by the mortgage in favor of the vice-president advancing the cash may be upheld upon proof of the good faith and honest purpose of the transaction.

6. The directors of the bank who were interested in the manufacturing company were not competent to ratify the transaction on behalf of the bank so far as the bank thereby released its prior securities and subordinated its lien under the mortgage to the liens of the other mortgagees.

7. No ratification of such priority of the liens of the other mortgagees over that of the bank can be inferred from a pleading

on behalf of the bank seeking foreclosure of the mortgage but denying such priority.

8. Nor can ratification be predicated upon the fact that the money loaned to the manufacturing company by the vice-president of the bank was deposited in the company's checking account at the bank.

9. Where the respective holders of several notes secured by a single mortgage running to them jointly do not stand equal in equity with reference to the manner of acquisition of security or with reference to one another, the rule of *Wood v. Trask*, 7 Wis. 566, and other cases following that case, does not confer priority of lien upon the holder of the note first falling due.

10. Thus, in the case above stated, a claim of the president of the bank to priority of lien, on the ground that his note fell due before that of the bank, cannot be upheld where he advanced no money but merely guaranteed the payment of certain debts of the manufacturing company.

11. But, as between said president and the vice-president who advanced money to the company, their equities being otherwise equal, and the note of the vice-president by agreement falling due first, the latter may have priority under the rule above referred to.

12. Where one mortgage runs to the payees in three several notes secured thereby, and one of said payees advanced cash for his note, the second undertook to pay certain other notes of the mortgagor for his note, and the third secured a pre-existing indebtedness of the mortgagor by its note, and the mortgagor, by agreement to which the third payee was not a party, consented that the second might, instead of paying said other notes, guarantee payment thereof, and, acting thereon, the second payee did not pay said other notes, it was error to provide in the decree of foreclosure that the sheriff should deposit part of the proceeds of the sale with the clerk of the court, there to remain until said second payee should deposit with the clerk the notes of the mortgagor guaranteed by him, since this might tie up the proceeds of sale for an indefinite time.

13. Properly, under the circumstances stated, the second payee should be given a short time within which to pay and discharge said other notes of the mortgagor, and should have his proportion of the proceeds of sale only in case he did discharge said notes within such time.

14. The claim to priority of lien by a plaintiff in foreclosure may be contested on equitable grounds by a mortgagee whose debt is not due, as well as by one whose debt is due.

APPEALS from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Reversed.*

The defendant *Crandon State Bank* appealed from the whole of the judgment of foreclosure. The defendant *Keith* appealed from that portion of the judgment which gave plaintiff, *Shaw,* a priority over him, and also that portion which required him to deposit the notes therein mentioned as a condition of receiving any part of the proceeds of the foreclosure sale.

For the appellant *Crandon State Bank* there were briefs by *Henry Hay,* attorney, and *Goodrick & Goodrick,* of counsel, and oral argument by *Mr. Hay* and *Mr. E. J. Goodrick.*

For the appellant *Keith* there was a brief by *G. H. Dawson* and *Kreutzer, Bird, Rosenberry & Okoneski;* for *Mr. Keith* as respondent there was a separate brief by *Kreutzer, Bird, Rosenberry & Okoneski;* and the cause was argued orally by *C. B. Bird.*

For the respondent *Shaw* there was a brief by *Samuel Shaw,* in person, and a separate brief by *Barbers & Beglinger,* of counsel, and the cause was argued orally by *Mr. Shaw* and *Mr. Charles Barber.*

The following opinion was filed January 31, 1911:

TIMLIN, J. This is an action to foreclose a mortgage executed by the Crandon Manufacturing Company on December 9, 1907, to *Samuel Shaw, M. D. Keith,* and the *Crandon State Bank* jointly to secure three promissory notes bearing even date with said mortgage, one in the sum of $10,000 payable to *Samuel Shaw* and due one year after date, one in the sum of $8,000 payable to *M. D. Keith* and due two years after date, and one in the sum of $14,000 payable to the *Crandon State Bank* and due three years after date.

The respondent, *Samuel Shaw,* commenced this suit for foreclosure on December 31, 1908, claiming priority of lien under said mortgage because his note fell due first, and mak-

ing the mortgagor a defendant and *Keith* and the *Crandon State Bank* defendants as subsequent lienholders. The mortgage contained a provision that in case of nonpayment of any sum of money, either principal, interest, insurance premiums, or taxes, etc., the whole amount secured by the mortgage should, at the option of *Shaw, Keith,* and the *Crandon State Bank,* their representatives or assigns, to be exercised at the time of such default or any time thereafter, be deemed to have become due, etc. Purporting to act under this power, *Keith* and the *Crandon State Bank,* because of interest in default upon each of their respective notes, each served a notice in writing of option to declare the whole sum secured by said mortgage due and payable. *Keith* and the bank each answered *Shaw's* complaint, denying his claim to priority of lien and counterclaiming for foreclosure, *Keith* claiming a *pro rata* distribution of the proceeds of sale of the mortgaged property and the bank claiming priority of lien over *Shaw.* The circuit judge gave judgment of foreclosure and sale, but giving the plaintiff, *Shaw,* priority of payment out of the proceeds of such sale to the amount of his said note, interest, and costs.

The mortgagor, Crandon Manufacturing Company, is a corporation organized in the year 1903, situate and doing business at Crandon in Forest county in this state, and engaged in manufacture. It had a board of six directors, among whom were *Keith, Shaw,* and Haile. It had an authorized capital of 400 shares of $100 each, of which only 270 shares had been issued, and its officers were P. Shay president and W. W. Waite secretary. Shay did not reside at Crandon or administer the business of the corporation. It had a finance committee consisting of *Samuel Shaw,* W. W. Waite, and Almon Smith. On the day on which the mortgage was given it owed the *Crandon State Bank* $14,000, evidenced by notes, and had an overdraft in said bank of $2,248.43. It also owed $6,000 on notes to the First Na-

tional Bank of New London, of which bank *Keith* was president, and $1,500 to the Allenton State Bank on a note, and $500 to one Tiernan, also evidenced by a note. The trial court found that the manufacturing company was not then insolvent, but the undisputed evidence shows that it was insolvent in the sense that it could not meet its liabilities in the ordinary course of business as they matured, but perhaps not insolvent in the sense that all its assets at a fair market value would not equal its liabilities to creditors, and the undisputed evidence shows that it was in a precarious financial condition.

The *Crandon State Bank* was organized in the year 1903 as a banking corporation under the laws of Wisconsin, situated and doing business at Crandon, with an authorized capital of $25,000, and at the time of making the mortgage in question it had four directors. Said *Keith* was a stockholder, director, and president of this bank; Haile was a director and the cashier of the bank; *Samuel Shaw* was director and vice-president of the bank; and Almon Smith was assistant cashier. The other bank director was a traveling man named Crabtree, who took little part in the proceedings relative to the taking of the mortgage. The plaintiff, *Shaw,* was an attorney and drew up or dictated the papers and resolutions relative to the mortgage and notes in question as well as the mortgage and notes. The bank president, *Keith,* testifies that *Shaw* in doing so was acting as attorney for the bank and that he relied on *Shaw.* This is denied by *Shaw,* and the court finds that in doing so *Shaw* did not attempt or pretend to act as attorney for the bank. *Shaw's* interest, together with that of his wife and daughter, in the bank amounted to fifty shares out of 250 shares, and his like interest in the manufacturing company amounted to forty shares out of 270 shares. The bank was not represented by attorney or by any person not interested in the manufacturing company. The bank held as security for this indebtedness a deed of about four acres of land in the city of Crandon worth

about $2,500, and a deed from F. W. Marquardt and wife of land known as the "Marquardt eighty" suitable for platting and worth about $5,000. August 18, 1906, the directors of the manufacturing company "resolved that as there was no record made upon the minutes as to the deeding of the Marquardt eighty to the *Crandon State Bank,* said deed was not legal because not authorized; resolved that said *Crandon State Bank* re-deed said eighty acres of land to the Crandon Manufacturing Company, and that *Samuel Shaw* be appointed trustee and receive all moneys and securities taken in from the sale of lots, blocks, and outlots in the Marquardt eighty, and turn the same over to the *Crandon State Bank* toward the liquidation of the debts of said Crandon Manufacturing Company to the *Crandon State Bank.*" On the same day the directors of the *Crandon State Bank* held a meeting at which there were present directors *Keith, Shaw,* Crabtree, and Haile.

"It was moved by *Mr. Shaw* and seconded by Mr. Crabtree and duly carried that the Marquardt eighty, the title of which rested in the *Crandon State Bank* as security for loans, be transferred to the Crandon Manufacturing Company."

The land was platted, and *Shaw* accepted the trust because he reported sales as trustee, his last report being December 16, 1907, a week after the giving of the mortgage in question, on which date the record book of the manufacturing company shows the following:

"*Samuel Shaw,* trustee, reports the sale by C. H. Weast as agent of lots 3 and 4 of block 9 of Page's addition to Crandon, for $160, of which $50 has been paid, Weast reserving $8 of same for his commission, and *Samuel Shaw* having turned over the balance of $40 to the treasurer of said Crandon Manufacturing Company, said trustee also reports that no other sale of the real estate of the company has been made since his last report."

This treasurer of the Crandon Manufacturing Company, it will be remembered, was also cashier of the bank. The mort-

gage in question covers these two pieces of property, although the title to the four-acre tract remained in the bank.

It thus appears that the affairs of the bank were thoroughly in the hands and under the control of the directors and officers of the manufacturing company, and the affairs of the manufacturing company were to the same extent under the control of the directors and officers of the bank. And the admission of the plaintiff, *Shaw*, in a letter written after his note became due is fully justified by the undisputed facts: "The management is substantially the same thing as that which we have in the bank, that is the controlling influence in the management." At a stockholders' meeting of the manufacturing company on December 7, 1907, the following resolution was unanimously adopted:

"Resolved by the stockholders of the Crandon Manufacturing Company that the board of directors are hereby authorized and empowered to mortgage all the real property of said Crandon Manufacturing Company to the amount of $32,000, bearing seven per cent. interest per annum, payable annually, $10,000 of such sum to become due and payable on or before one year from date, $8,000 of such sum to become due and payable on or before two years from date, and $14,000 to become due and payable on or before three years from date hereof, and to authorize and empower said board of directors to execute and deliver with said mortgage promissory notes of even date with the mortgage aggregating in amount the said sum of $32,000 and conforming as to rate of interest and time of maturity, and any other matter stated, to the conditions above set forth, the proceeds of said mortgage and promissory notes to be used by said board of directors in paying the present indebtedness of said Crandon Manufacturing Company and paying for stock to be manufactured into hubs and heading during the year 1908."

The directors of this company on December 9, 1907,

"Resolved that the board of directors of the Crandon Manufacturing Company do exercise and use the power vested in them by the stockholders of said company at a legal meeting

of the same, held on December 7, 1907, and do mortgage the real estate and appurtenances of said company as follows:

"Said mortgage shall be a first mortgage on said property in the sum of $32,000, and three several notes shall be executed and delivered with said mortgage as follows: A note payable on or before one year from date, to be called note No. 1, to *Samuel Shaw* in the sum of $10,000, and said sum to be advanced to the secretary of this corporation as called for on the written order of said secretary and the president or vice-president of this corporation, and such moneys to be used to purchase stock for this corporation to be manufactured in the year 1908. A note payable on or before two years from date, to be called No. 2, to *M. D. Keith,* and a note payable three years from date, called No. 3, to *Crandon State Bank,* No. 2 to be in the sum of $8,000 and No. 3 in the sum of $14,000, said notes Nos. 2 and 3 being executed to pay up and extinguish indebtedness of this corporation, all of said notes to bear seven per cent. interest, payable annually, and the president and secretary of this corporation are hereby authorized, empowered and instructed to execute and deliver said notes, and to execute, acknowledge and deliver said mortgage, as above set forth, said notes and mortgage to bear even date herewith."

The directors present at this meeting were *Keith, Shaw,* Haile, Gifford, Waite, and Shay. The mortgage and notes were accordingly executed and delivered, the mortgage to Smith, assistant cashier of the bank, and each note to the payee named therein. The notes aggregating $14,000 held by the bank were surrendered and delivered up to the manufacturing company and the back interest on the same adjusted, and thereafter this note of $14,000 was entered on the books of the bank as part of its bills receivable and continued as such. *Shaw* knew at the time of taking his mortgage that the manufacturing company, outside of his loan, owed at least $22,000 bills payable. Indeed the very mortgage to which he was a party informed him of this, but he had other means of knowledge also. The overdrafts of the manu-

facturing company in its checking account at the bank are considered relevant because it is said that *Shaw's* money was applied on these overdrafts. In the meeting of November 29, 1907, when the mortgage in question and the loan from *Shaw* were discussed, *Shaw,* in anticipation of the receipt of this note and mortgage, agreed to and on the next day advanced to the manufacturing company $1,500, which the manufacturing company deposited in its bank account, thus reducing its overdraft to that extent and leaving less than $1,000 overdraft. On December 9th *Shaw* advanced $2,000 more, which the manufacturing company also deposited in its bank account, and in the same way on December 31st $3,000, on January 1, 1908, $1,000, and on February 15, 1908, $2,500. The manufacturing company was continually drawing checks on this account, and the second payment by *Shaw* left the manufacturing company a credit in this account, but the same men were managing the affairs of both sides and authorizing and drawing checks against this account, and the mere fact that the instalments paid in by *Shaw* on his loan were deposited in the checking account of the manufacturing company at the bank has no particular legal significance. Sixty-six days after giving the mortgage and on February 15, 1908, the directors of the manufacturing company passed a resolution to shut down unless business is taken to warrant further running of the mill, and also to notify all parties who were hauling timber to the manufacturing company not to cut any more stock. Some time later the manufacturing company suspended operations with a considerable amount of raw material on hand which was worked up and sold and the proceeds used in paying operating expenses and debts incurred after the giving of the mortgage in suit. The manufacturing company is now doubtless insolvent.

Parol evidence is offered by *Shaw* to show an oral agreement that he was to have priority of payment, and on the part of *Keith* to show an oral agreement that the three notes

should prorate in the mortgage security. The court, however, excluded this last parol evidence as tending to modify or contradict the legal effect of the writings. The mortgage contained a recital that

"Said notes Nos. 2 and 3 being given to extinguish and pay in full the present indebtedness of the said Crandon Manufacturing Company."

On January 17, 1908, the stockholders of the manufacturing company in meeting "Resolved that note No. 2, given to *M. D. Keith* on December 9, 1907, with the first mortgage on the property of this company, has been so given to him with the express understanding and agreement on his part that he has received the same to protect this company from outstanding indebtedness in notes to the amount of $8,000." *Keith* never paid or discharged any of these notes, although he contends he made himself liable for payment thereof by all the writings hereinbefore referred to and by oral statement to some or all of the holders of the notes. After the taking of said mortgage a controlling interest in the shares of stock of the bank passed to purchasers not interested in the manufacturing company, and the *State Bank* was furnished with new or additional capital and organized as a national bank. The persons interested in the manufacturing company did not at any time own all the stock of the *Crandon State Bank.* The circuit court also found that the manufacturing company would have been unable to secure material with which to operate or to borrow money had not *Shaw* advanced this $10,000; "that the loan of *Shaw* to the manufacturing company was made at the earnest solicitation of both officers of the bank and of the manufacturing company . . . and upon the express promise and expectation that the same would be repaid promptly when due . . . and that other persons interested in the bank and manufacturing company would help the situation and lend the company financial aid. That the transaction was in all respects a fair one and was thought to

be at the time by all concerned and was in fact for the best interests both of the bank and of the manufacturing company, and that a failure of the manufacturing company would have seriously affected and impaired the credit of the bank. That the said plaintiff, *Shaw,* was guilty of no violation of trust and was guilty of no fraud, actual or constructive." "That *Shaw* and his family ceased to be stockholders of the bank in September, 1908, when his interests were taken by the new stockholders." "The new stockholders were fully informed of the default on the mortgage and of the existence of the mortgage and of the value of the properties and generally of all the material facts."

"That with full knowledge of all the facts necessary to protect any of its rights in the matter the said bank has deliberately and unqualifiedly ratified, confirmed and affirmed the transaction and all of it. That at no time has the bank offered or placed any of the parties *in statu quo.* That it has from the outset accepted the mortgage and notes as given, received the benefits of the transaction, and in this action has asked a foreclosure of the same. It is found that the bank fully and completely ratified the transaction, and especially the making and giving of the mortgage, and has always intended to rely upon and take the benefits thereof."

These findings of fact put the case in the strongest light for the plaintiff, *Shaw.* So far as they find the good faith of *Mr. Shaw,* the distress of the manufacturing company, the good intentions in his loan to the company, and that *Shaw* was guilty of no fraud, they are supported by evidence and must stand. But the finding that *Shaw* was guilty of no constructive fraud is not a finding of fact but a conclusion of law drawn from undisputed facts. The same is true of the finding that the bank ratified and confirmed the transaction. The only ratification of the bank is either through *Shaw* and his associate directors who were interested in the manufacturing company, or by a counterclaim for foreclosure of the

mortgage herein, or by permitting the manufacturing company to deposit in its checking account with the bank the money received from *Shaw*. This is no ratification, because the directors were incompetent to ratify it; because the counterclaim for foreclosure challenges *Shaw's* priority instead of approving it; and because a deposit by the manufacturing company of the proceeds of the loan from *Shaw* in its checking account with the bank is in no sense a ratification of *Shaw's* priority. *Shaw* was interested in the manufacturing company and a director thereof interested in its prosperity, a director of and interested in the prosperity of the bank, and also interested in the prosperity of the village of Crandon as a real-estate dealer and property holder. He advanced his money as a loan to his own corporation, the manufacturing company, under the expectation that he would be paid out of the proceeds of the operation of the mill upon the raw material purchased with the avails of his loan, and took the mortgage as security, and we may assume that he had the welfare of the bank in mind, but as things turned out he was mistaken; his loan brought no profit to the manufacturing company wherewith to pay him or to pay the bank or to pay any of the debts of the manufacturing company outstanding at the time he made his loan.

Upon this showing a decree of foreclosure and sale was entered giving *Shaw* priority of lien on all the property covered by the mortgage and in the proceeds of the sale of this property. It was also provided that *Keith* was entitled to judgment of foreclosure with costs, but no payment of the proceeds of foreclosure should be made to *Keith* except on condition that he deposit with the clerk of the court the $8,000 of notes of the manufacturing company assumed and guaranteed by him, and that until such condition is complied with the sheriff deposit the amount of such money with the clerk of the court. Subject to the prior lien of *Shaw*,

Keith and the bank prorate in the surplus, if any, received from the foreclosure sale after *Shaw* has been paid in full with interest and costs.

The decree rests upon *Wood v. Trask,* 7 Wis. 566; *Marine Bank v. International Bank,* 9 Wis. 57; *Lyman v. Smith,* 21 Wis. 674; *Pierce v. Shaw,* 51 Wis. 316, 8 N. W. 209; *McLean v. Hoehle,* 98 Wis. 359, 74 N. W. 120. In each of the cases above quoted the rule that where several notes falling due at different times are secured by the same mortgage that which falls due first is entitled to priority in the security is stated with the qualification that this is a general rule which must prevail unless some special equity intervenes to give a precedence to some other claim. In *Marine Bank v. International Bank, supra,* the court said:

"We were well aware that in some of our sister states a contrary doctrine had obtained, and that it had been held that the fund arising from the sale of mortgaged premises, in case of a deficiency, should be ratably applied among the holders of the different notes or instruments; but when no special equities intervened to vary the rule, we thought the note or instrument first becoming due was entitled to priority in payment. And, without enlarging upon the reasons that led us to this conclusion, it appeared to us that this priority must exist, under our statute, as the notes were the principal and the mortgage but an accessory, and the holder of the first note, upon default in its payment, had the right to commence his action, and subject the mortgaged premises to foreclosure and sale for the satisfaction of his debt. It seemed to us, therefore, that the maxim of *prior in tempore, potior in jure,* rightly applied, in the absence of all equitable considerations between the assignors and assignees, to change this rule, or principle of law." See, also, 1 Pom. Eq. Jur. § 414.

This rule applies only where the parties owning the respective notes stand equal in equity with reference to the manner of acquisition of security and with reference to one another. Trustees or fiduciaries acting for others and in the same transactions for themselves; consenting for the bank

to release its existing securities and put the property on which these securities rested into a common group with other property of the mortgagor, covering this common group of property by a mortgage running to the directors and to the bank jointly, and at the same time consenting for the mortgagor to make the notes secured by the same mortgage payable in such order that the notes given to the fiduciaries come due first and that of the beneficiary last, and consenting for themselves to thus take priority and for their beneficiary to thus give them priority over that beneficiary, cannot hold priority under the rule of the cases cited. *Mr. Shaw* as director of the bank and director of the manufacturing company occupied a fiduciary relation to each of these corporations. He also was trustee of an express trust with reference to the Marquardt tract. The mortgage covered this tract and the four-acre tract upon which the bank had a prior security, and the legal effect now claimed by *Shaw* and given him by the decree below of the mortgage is to release the security of the bank on this four-acre tract and to release *Mr. Shaw's* trusteeship on the Marquardt tract and put *Mr. Shaw's* loan in as a prior lien on both. It is immaterial whether the security of the bank on the Marquardt tract was valid or invalid as to other creditors. It is the relation of *Mr. Shaw* to that security rather than the validity of the security which determines the question here.

The circuit court as to these two tracts on which the bank had security applied the wrong rule, as shown by 2 Pom. Eq. Jur. § 957, where two classes of cases are recognized: one where the fiduciary is dealing with his beneficiary, each contracting for himself; the other where the fiduciary in the transaction as representative of his beneficiary contracts or deals with himself in his personal or individual capacity, thus being both vendor and vendee, obligor and obligee, releasor and releasee. In the first class of cases the transaction may sometimes be upheld upon a showing of good faith,

valuable consideration, and that the transaction was not inequitable. In the second class of cases this showing will not avail.

"The second class includes all those instances in which one party, purporting to act in his fiduciary character, deals with himself in his private and personal character, without the knowledge of his beneficiary, as where a trustee or agent to sell sells the property to himself. Such transactions are voidable at the suit of the beneficiary, and not merely presumptively or *prima facie* invalid. . . . The circumstances show that there could not possibly be the good faith, knowledge, and free consent required by the principle, and therefore the result which is a rebuttable presumption in the first class of transactions becomes a conclusive presumption in the second." 2 Pom. Eq. Jur. § 957.

This is the rule in Wisconsin, as shown by the *Taylor Orphan Asylum Case,* 36 Wis. 534, and *Cook v. Berlin W. M. Co.* 43 Wis. 433. As was said in *Hutson v. Jenson,* 110 Wis. 26 (85 N. W. 689), at page 40:

"The rule of these cases is that no dealing by one in fiduciary capacity with himself individually can prejudicially change the situation of the beneficiaries or their property. The application of this rule is not dependent upon the existence either of fraud or mismanagement; for its foundation is in a sound public policy, which would exclude all necessity of investigation of either the honesty or the wisdom of such dealings in a dual capacity."

The effect of the findings and decree is that a fiduciary and trustee acting with other disqualified fiduciaries may take property upon which their beneficiaries had security, turn it back to the debtor corporation which they also control, and then take a mortgage on all the property of the latter corporation, including the property so turned back, and make the several notes secured by this mortgage due at such times that the trustee's note will first fall due, and so obtain priority of lien on the property returned to the debtor by them acting for their beneficiary. This cannot be done. Neither good faith

nor benevolent purposes, nor acquiescence by the bank while under their control, nor the attempted foreclosure of the mortgage by the bank (the bank in such foreclosure claiming priority), will avail to prevent the bank reasserting as against such fiduciary its prior lien on the property which it once held as security. Public policy forbids us to uphold any such decree if we were otherwise disposed to do so. But the rule is a salutary one and should be strictly adhered to under all circumstances. It will not do for a fiduciary, who in contracting acts for himself and for his beneficiary, to escape the invalid consequences of such act by mere proof that he acted in good faith and paid a valuable consideration. The decree cannot be supported on the ground that *Mr. Shaw* paid in cash while the other parties merely secured pre-existing debts. He paid in cash to his own manufacturing company and not to the bank. And he was obliged to consent for the bank, both that the bank release its prior securities and that the bank accept the third note or the note last due. He was aided in this by the other officers of the bank sustaining the same relation to both corporations that *Shaw* did. His money, while it might improve the chances of the mortgagor to pay out of its business operations, brought in no security under the mortgage. Further, the transaction on the part of *Shaw* not only subordinated the bank to *Shaw's* lien and took from the bank security it already possessed, but also attempted to postpone the bank to *Keith's* lien under the mortgage. *Keith* also consented to the release by the bank of the securities and that they be thrown into a common fund with other property of the mortgagor and this all covered by a new mortgage in which he or the other bank in which he was interested should have priority over the *Crandon State Bank* by reason of *Keith's* note coming due before that of the *Crandon Bank*. *Shaw* consented to this and *Keith* consented to it. *Keith* did not pay up the notes of $8,000, as it was first intended he should, and the directors of the manufacturing com-

pany appear to have later consented that he need not, but merely save the manufacturing company harmless thereon. This could not affect the bank. As to the bank, he has not paid as he agreed to in the mortgage in which he and the bank and *Shaw* were mortgagees. With reference to this four-acre tract and the Marquardt eighty, *Shaw* and *Keith* are equal in their disabilities, equal in equities or in lack of equity. *Shaw* put in cash; *Keith* did not. *Shaw's* note falls due before *Keith's*. *Keith* has no equity to displace the priority which *Shaw* would have from this circumstance alone. Rather the contrary. Therefore in the four-acre tract and in the Marquardt eighty the order of priority will be first the *Crandon State Bank,* second *Shaw,* and third *Keith.*

With reference to the remainder of the mortgaged property the case rests upon different rules of law. Upon this the bank had no security prior to the making of the mortgage in question. The bank paid out nothing and parted with nothing. It received only the additional security furnished by the third note secured by this mortgage. There was no consent necessary on the part of the bank except the consent to receive the new security. This the directors were not so absolutely disqualified to give. The rule resting in public policy hereinbefore applied did not obtain because there was no contractual relation by which the disqualified directors represented the bank in parting with anything or in undertaking any obligation. They were not as to this on both sides of the transaction, buyer and seller. Nevertheless they were fiduciaries and disqualified to obtain any advantage over their beneficiary. But the disqualification as stated was not so absolute. The transaction might be supported in equity if made in absolute good faith and apparently for the best interests of the bank as it appeared at the time and to induce *Mr. Shaw* to part with his $10,000. On this branch of the case the findings of the court herein referred to establishing the good faith

and fair purposes of *Mr. Shaw* and the manner in which he parted with his cash have great force and significance. So far as the manufacturing company is concerned he in effect made it a condition of loaning this $10,000 to it that he should be first paid and have priority, according to the findings of the court. The pre-existing debt to the bank was not increased. Of the three persons secured by the mortgage *Shaw* was the only one who paid money to the mortgagor for his note. The other two, the *Crandon State Bank* and *Mr. Keith,* merely had secured to them, as the thing turned out, existing claims against the manufacturing company. It appeared to all concerned, according to the findings, that this disposition and this mode of security was for the best interests of the manufacturing company and its creditors, including the *Crandon State Bank.* It placed the *Crandon State Bank* in no worse position than it was before the mortgage was made and might have bettered its condition. According to the findings *Mr. Keith* agreed that *Mr. Shaw's* notes should come due first, and as to this part of the mortgaged property he, to say the least, has no superior equity to displace the priority which the law would give to *Shaw* under such circumstances. If the *Crandon State Bank* had prayed that its lien on this remainder of the mortgaged property be declared paramount to that of *Keith,* the bank would be entitled to such relief. That part of the decree which provides that the sheriff shall deposit part of the proceeds of the sale with the clerk of the court, there to remain until *Mr. Keith* deposit with the said clerk the $8,000 of notes of the Crandon Manufacturing Company assumed and guaranteed by him, cannot be approved. This might tie up that money for an indefinite time. That should be changed so that *Mr. Keith* should be given a short time, say sixty days, within which to pay up those notes and make a supplemental report to the court, filing the paid and discharged notes therewith, and in default of his so doing that he have no part of the proceeds of sale. But

subject to this requirement the order of priority in this remainder of the mortgaged premises should be first *Shaw,* second the *Crandon State Bank* in the event that *Keith* does not pay up the notes. But in the event that *Keith* pay up these notes and make proof thereof as aforesaid the priority should be first *Shaw,* second the *Crandon State Bank* and *Keith pro rata* on the original amounts awarded by the decree appealed from, as asked in the pleading of the bank, until their respective claims are discharged and paid, the surplus, if any, to be brought into court. The validity of the notices of option served by the bank and by *Keith* declaring the whole amount due is a matter of no concern here. Their attempt to foreclose their interest in the mortgage is a matter of no estoppel. The plaintiff comes into court claiming priority. The bank and *Keith* have conceded liens due or not due and deny his priority. They may as effectually contest *Shaw's* claim to priority upon liens securing sums not due as upon liens securing sums due. The manufacturing company having defaulted, the sums secured by the liens may be all considered due for the purpose of foreclosure and sale except in the case of *Keith.* No sum will be due to him unless and until he discharges the notes to the amount of $8,000 to secure payment or discharge of which his interest in the mortgage was given by the manufacturing company.

The decree of the circuit court must be reversed, and the cause remanded with directions to enter a decree in accordance with this opinion.

By the Court.—It is so ordered.

A motion for a rehearing was denied April 5, 1911.

GOTFREDSON BROTHERS COMPANY, Appellant, vs. DUSING and another, Respondents.

January 12—April 5, 1911.

Mortgages: Homestead: Reformation.

The description in a mortgage cannot be corrected, in an action to reform the instrument, so as to include the homestead of the mortgagors, who were husband and wife at the time of its execution. Sec. 2257, Stats. (1898), does not relate to an action for reformation, and the amendment of sec. 2203 by ch. 45, Laws of 1905, did not alter the rule.

APPEAL from a judgment of the circuit court for Calumet county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

Action for the reformation and foreclosure of a mortgage. August 16, 1906, the defendants *Charles J. Dusing* and his wife, *Amanda Dusing,* for the purpose of securing a preexisting indebtedness due from *Charles J. Dusing* to the plaintiff, executed a mortgage intended and supposed to cover their homestead. By mistake of all parties, other lands, and not the homestead, were described in the mortgage. The wife, who was not possessed of any separate estate, appeared and objected to a reformation of the mortgage and sale of the homestead. From a judgment refusing reformation and dismissing the complaint as to the wife the plaintiff appealed.

For the appellant there was a brief by *Minahan & Minahan,* and oral argument by *V. I. Minahan.*

For the respondents there was a brief by *Nash & Nash,* and oral argument by *E. J. Nash.*

The following opinion was filed January 31, 1911:

VINJE, J. The question presented by this appeal is, Can a description in a mortgage be corrected in an action to reform the instrument so as to include the homestead of the mortgagors, who were husband and wife at the time of the

execution thereof? In the cases of *Petesch v. Hambach,* 48 Wis. 443, 4 N. W. 565; *O'Malley v. Ruddy,* 79 Wis. 147, 48 N. W. 116; and *Cumps v. Kiyo,* 104 Wis. 656, 80 N. W. 937, this court held that it could not. We are urged to overrule these decisions because they were made without reference to sec. 2257, Stats. (1898), which it is claimed gives the court such power. That section provides:

"The circuit court of any county in which a conveyance of real estate shall have been recorded may make an order correcting the description in such conveyance on proof being made to the satisfaction of the court that such conveyance contains an erroneous description, not intended by the parties thereto; or when the description is ambiguous and does not clearly or fully describe the premises intended to be conveyed, if the grantor therein is dead or a nonresident of the state and the person to whom it was made, his heirs, legal representatives or assigns have been in the quiet, undisturbed and peaceable possession of the premises intended to be conveyed for the term of ten years or more; but this section shall not prevent an action for the reformation of any conveyance, and if in any doubt the court shall direct such action to be brought."

It is clear that the conditions under which the order therein provided for may be made do not apply to this case. Here the grantors are neither dead nor nonresidents of the state, and the grantee has never been in possession of the premises conveyed. Moreover, the statute was in existence when the cases mentioned were decided, and the reason it was not therein referred to was no doubt because it in no way relates to an action for reformation.

The policy of the law and the reasons for refusing reformation are so fully set forth in the cases above referred to that a restatement thereof is not deemed necessary. In the case of *O'Malley v. Ruddy, supra,* the court refused reformation even though the wife by her answer consented thereto, on the ground that the statute had provided for no such mode of alienation of a homestead; that nothing less than her signature on the instrument of conveyance was effectual. No

valid reason has been called to our attention why we should overrule those cases, and we must decline to do so.

But it is urged that the amendment of sec. 2203, Stats. (1898), by ch. 45, Laws of 1905, destroys the reasons for the rule laid down in the cases cited, and therefore destroys the rule, inasmuch as the nature of the homestead estate in the wife is changed. Sec. 2203 reads as follows:

"Conveyances of land or of any estate or interest therein may be made by deed, signed and sealed by the person from whom the estate or interest is intended to pass, being of lawful age, or by his lawful agent or attorney, and acknowledged or proved as directed in this chapter, without any other act or ceremony whatever; but no mortgage or other alienation by a married man of his homestead, exempt by law from execution, shall be valid or of any effect as to such homestead without the signature of his wife to the same."

It was enacted in 1858 and remained unchanged until the amendment of 1905. It was therefore in force when the above mentioned cases were decided. By the amendment of 1905 it was changed to read as follows:

"Conveyances of land or any estate or interest therein may be made by deed signed and sealed by the person from whom the estate or interest is intended to pass, being of lawful age, or by his lawful agent or attorney, and acknowledged or proved as directed in this chapter, without any other act or ceremony whatever; but no mortgage or other alienation by a married man of his homestead, exempt by law from execution, or any interest therein, legal or equitable, present or future, by deed or otherwise, without his wife's consent, evidenced by her act of joining in the deed, mortgage or other conveyance, shall be valid or of any effect whatever."

It will be perceived that no attempt was made by the amendment to change the nature of the homestead estate, but only to strengthen the protective efficacy of the statute, which, as stated by this court in *Wilburn v. Land,* 138 Wis. 36, 119 N. W. 803, had been somewhat emasculated by the construction given it in *Conrad v. Schwamb,* 53 Wis. 372, 10 N. W. 395;

Ferguson v. Mason, 60 Wis. 377, 19 N. W. 420; and *Jerdee v. Furbush,* 115 Wis. 277, 91 N. W. 661. Indeed, the amendment was passed as a direct result of the decision in *Jerdee v. Furbush* and of the suggestion therein contained, in order to more completely protect the homestead estate and to render any alienation thereof by the husband, without the signature of the wife, void. The phrase in the amendment, "evidenced by her act of joining in the deed, mortgage or other conveyance," is equivalent to the phrase "without the signature of the wife to the same" in the law as it stood before. Only by affixing her signature to the conveyance can a wife join therein. If it was the policy of the law to refuse a reformation under the statute as it stood before the amendment, it should be all the more its policy to refuse it under the statute as amended.

It is also urged that no reformation is necessary; that the court can give such a construction to the erroneous description as to make it cover the right one, and foreclose upon the actual homestead with the description so corrected by construction. This contention was aptly answered by the trial judge in his opinion, where he said:

"It makes no difference, I take it, whether we call it a 'reformation' or a 'correction.' Both mean the same thing as applied to the present question. The stubborn fact remains that the plaintiff cannot have a foreclosure on his homestead without the court putting in a description entirely different from what the parties have put into the instrument."

The statute prohibits an alienation by correction as much as it does by reformation, for the one would comply with it no more than the other. In either case there would be no conveyance with the signature of the wife to the same, or with her consent evidenced by her act of joining therein. The latter is now necessary to a valid mortgage upon the homestead of a married man.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied April 5, 1911.

WALTERMAN, Respondent, vs. VILLAGE OF NORWALK, Appellant.

January 13—April 5, 1911.

Municipal corporations: Streets: Property rights of abutting owners: Transfer to municipality: When binding on successor in title: Notice: Right to have way unobstructed: Injunction: Public policy: Consideration: Sealed instrument: License, when revocable: Grant of easement: Construction of deed: Nuisance: Estoppel.

1. The owner of a lot abutting on a public street may sell or give away his mere private property right to the use of that part of his premises within the boundaries of the street, including his right to have the way unobstructed; and may bind his successor in title, provided he alienates said property right in such a way as to charge such successor with notice of the incumbrance.
2. An instrument in writing, duly witnessed and under seal, executed by an abutting owner to the municipality, "on behalf of himself, his heirs, executors, and assigns," releasing all demands, actions, or causes of action which might result from the construction of a building for municipal purposes in the street in front of his premises, is binding upon him and upon his subsequent grantee who bought the land with full knowledge of the situation.
3. Such an agreement is not contrary to public policy as being a contract not to sue to vindicate the public right in the street.
4. One who has thus parted with his private property right in the adjoining street cannot thereafter maintain a private action against the municipality for a mandatory injunction to compel the way to be kept open and unobstructed.
5. An instrument formally executed under seal imports a consideration sufficient to support it.
6. A *written* license by the owner of land to another, privileging such other to use the licensor's land for some purpose, after being acted upon so that a loss would be inflicted upon the licensee by its withdrawal, is irrevocable. In this state only oral licenses are revocable under such circumstances.
7. The use of the words "remise, release and forever discharge," in a sealed instrument authorizing the construction of a building for municipal purposes in a public street adjacent to the grantor's premises, indicates an intention to give something more

than a mere license, and may fairly be construed as granting an easement in the land.

8. Instruments formally executed under seal, though not containing technical words of grant, should be construed as such when necessary to effect their manifest purpose.

9. An action by a private abutter to enforce his private right in the adjacent street, with which he has parted by formal conveyance in writing, does not raise the question of public nuisance or the question of estoppel as against public rights.

APPEAL from a judgment of the circuit court for Monroe county: CHESTER A. FOWLER, Judge. *Reversed.*

Action for a mandatory injunction. The findings of fact indicate the issues presented for determination. The substance thereof is as follows: In 1895, Eugene Sullivan owned and possessed lots 7, 8, 9, and 10 of block 3 of the village of *Norwalk.* Plaintiff acquired title thereto sometime before commencement of this action and ever since has continued to be the owner thereof. While Sullivan owned the lots the village board caused a building to be constructed for municipal purposes in the street in front thereof. Plaintiff was then a member of the board and participated in the proceedings in respect to the matter and consented thereto. Before constructing the building the board obtained from Sullivan a writing, duly witnessed and executed under seal, but not expressing any consideration, releasing, on behalf of himself and all persons who might claim under him, all demands, actions, or causes of action which might result from constructing the building as proposed. The paper was executed to afford the village authority, as regards the land owned by Sullivan, to obstruct the street by placing the building thereon. About eleven years after the building was constructed the village board passed a resolution to remove it from the street. Two days thereafter it rescinded the resolution. Some time thereafter plaintiff constructed a building on his land. Plaintiff demanded removal of the building from the street and it was refused. Thereafter this action was commenced.

Plaintiff has been damaged to the extent of $2 per month from the 1st day of January, 1907, or a total of $72, by reason of defendant's conduct.

Upon such facts the court decided that the instrument given by plaintiff's predecessor in title was void and no defense to the action; that plaintiff was not estopped by the acts of such predecessor, nor by his own participation in locating the building in the street, from equitably and rightfully demanding removal of the same; and that he was entitled to judgment requiring such removal and for $72 damages besides taxable costs. Judgment was entered accordingly in such form as the court directed.

For the appellant there was a brief by *Masters, Graves & Masters* and *C. W. Graves,* and oral argument by *R. B. Graves.*

Daniel H. Grady, of counsel, for the respondent, contended, *inter alia,* that a municipality has no right to the use of streets for the erection of municipal buildings. 27 Am. & Eng. Ency. of Law (2d ed.) 151; *First Nat. Bank v. Tyson,* 133 Ala. 459, 91 Am. St. Rep. 46; *State v. Mobile,* 5 Porter, 279, 30 Am. Dec. 564; *Lutterloh v. Cedar Keys,* 15 Fla. 306; *State ex rel. St. Louis U. S. Co. v. Murphy,* 134 Mo. 548, 56 Am. St. Rep. 515; *Savannah v. Wilson,* 49 Ga. 476; *Pettit v. Grand Junction,* 119 Iowa, 352, 93 N. W. 381; *Cooper v. Alden,* Harr. (Mich.) 72; *Att'y Gen. ex rel. Holtz v. Heishon,* 18 N. J. Eq. 410; *Harrisburg's Appeal* (Pa.) 10 Atl. 787; *O'Neal v. Sherman,* 77 Tex. 182, 19 Am. St. Rep. 743, 746; *Barrows v. Sycamore,* 150 Ill. 588, 41 Am. St. Rep. 400. The street having been platted and dedicated to the use of public travel, the village of *Norwalk* had no power to devote it to a different public use. *Fort Wayne v. L. S. & M. S. R. Co.* 132 Ind. 558, 32 Am. St. Rep. 277, 283; 20 Am. & Eng. Ency. of Law (2d ed.) 1188; *Kimball v. Kenosha,* 4 Wis. 321, 330; *Hibbard, S., B. & Co. v. Chicago,* 173 Ill. 91, 40 L. R. A. 621, 622. The municipality cannot authorize the

construction of a building within the limits of the highway which in any manner interferes with the access or beneficial enjoyment of the abutting lotowner. Elliott, Roads & Streets (2d ed.) § 653; 27 Am. & Eng. Ency. of Law (2d ed.) 149, 150. A street cannot be vacated or abandoned by a proceeding of this character. 27 Am. & Eng. Ency. of Law (2d ed.) 117; *Denver v. Girard,* 21 Colo. 447. The so-called release is nothing more than a release of damages accruing to the grantor, and could only bind the party executing the same. To give it any other effect would be to say that an abutting owner could legalize the maintenance of a nuisance in the highway. *Tilly v. Mitchell & L. Co.* 121 Wis. 1, 6; *Donohoo v. Murray,* 62 Wis. 100, 103; *McFarland v. Lindekugel,* 107 Wis. 474, 477, 478; *Grand Rapids & I. R. Co. v. Heisel,* 47 Mich. 393; *Kimball v. Kenosha,* 4 Wis. 321, 330. The agreement permitting the municipality to maintain a public nuisance is in violation of statute and is void as against public policy. Secs. 904, 1326, Stats. (1898); *James v. Darlington,* 71 Wis. 173; *Ashland v. C. & N. W. R. Co.* 105 Wis. 398, 404; *Johnston v. Lonstorf,* 128 Wis. 17. The doctrine of estoppel cannot be invoked to sustain an unlawful act. *Kingman v. Graham,* 51 Wis. 232; *Neubauer v. Gabriel,* 86 Wis. 200; *Priewe v. Wis. S. L. & I. Co.* 103 Wis. 537. The doctrine of estoppel is not applicable when public rights are concerned. Elliott, Elements of Mun. Corp. § 102; *Webb v. Demopolis,* 95 Ala. 116, 21 L. R. A. 62, 63, 71. No estoppel can arise from an act of a municipal corporation or its officers in violation of or without authority of law, or even *ultra vires* acts. *Hibbard, S., B. & Co. v. Chicago,* 173 Ill. 91, 40 L. R. A. 621; *Stevens v. St. Mary's T. School,* 144 Ill. 336, 18 L. R. A. 832, 838; *Eichenlaub v. St. Joseph,* 113 Mo. 395, 18 L. R. A. 590, 593; *Baldwin v. Shill,* 3 Ind. App. 291, 29 N. E. 619; *Snyder v. Mt. Pulaski,* 176 Ill. 397, 44 L. R. A. 407, 409; 16 Cyc. 781; *Webb v. Demopolis,* 95 Ala. 116, 21 L. R. A. 62.

The following opinion was filed January 31, 1911:

MARSHALL, J. Assuming, for the moment, that the person under whom respondent claims title by grant or license in writing, privileged appellant to place the building on his land within the boundaries of the street, and that respondent subsequently, as the fact is, with full knowledge of the situation, came to the ownership of the premises, it is very difficult, if not impossible, to perceive any efficient reason why the surrender of the mere private right, which is the only one involved in this case, is not binding on him. We know of no law, written or unwritten, nor any established public policy precluding a person from selling or giving away his mere private property right to the use of his premises within the boundaries of a street. If there be no incompetency in that regard, nor infirmity in our assumption, it seems that the learned trial court erred in rendering the judgment complained of.

In view of the foregoing we turn to respondent's brief and argument in support of the judgment. The greater part thereof, as well as the opinion of the trial court, we must say, has little or nothing to do with the precise question involved; that of whether one may efficiently part with his mere private property right in lands as an abutting owner on a street, including the right to have the way unobstructed. We will refer briefly to the salient features of counsel's logic. Most of the contentions, as will be seen, may be admitted without affecting the final result.

It is said that estoppel cannot operate to evade statutory requirements. There is no question of estoppel, vital to this case.

Again it is suggested: The release is only binding on the one who made it. Why so? If one can grant to another the right to make some use of his land, necessarily he can bind his successor in title if he chooses to and executes his will so

as to charge such successor with notice of the incumbrance. What was the intent in this case? There can be no doubt about that. The language of the instrument, under which appellant claims, is about as free from ambiguity as could well be. The owner of the land at the time the privilege in question was given declared in the instrument executed to that end that it was on behalf of himself, his heirs, executors, and assigns. It seems too clear for discussion that such language includes and is as binding on respondent, who is admitted to have bought with a full knowledge of the situation, as on the person who signed it.

One who buys a lot abutting on a street, it is said, is entitled to judicial remedies to vindicate his private right to have the way kept open and unobstructed. Certainly, in the same sense that one is entitled to such a remedy to vindicate any violated remedial property right. But if a person sees fit to sell or give away such right and executes his purpose, he no longer possesses the requisite thing for the remedy to act upon. There can be no violated right originating after it has been parted with.

Next it is suggested that the instrument under which appellant claims is not binding because the essential of consideration is wanting. There are at least two efficient difficulties in the way of that cutting any figure. First, the instrument was formally executed under seal, and that imports a consideration sufficient to support it. Second, a written license by one to another privileging the latter to use the former's land for some purpose, after having been acted upon by the former so that a subsequent loss would be inflicted upon him by its withdrawal, is irrevocable. Mere privileges which are revocable after having been acted upon, are, in this jurisdiction, confined to oral licenses. *Thoemke v. Fiedler,* 91 Wis. 386, 64 N. W. 1030; *Huber v. Stark,* 124 Wis. 359, 102 N. W. 12. Moreover, the use in the instrument of the words, "remise, release, and forever discharge," etc., indicates pretty

clearly an intention to give something more than a mere license; to grant an easement in the land. Courts elsewhere have, so far as language would reasonably permit, construed instruments, formally executed under seal though not containing technical words of grant, as having been so intended when necessary to effect the manifest purpose. *Adee v. Nassau E. R. Co.* 65 App. Div. 529, 72 N. Y. Supp. 992. The drastic rule in New York was thus softened, which makes any mere license by a landowner to another to enjoy some privilege to use his premises, whether in writing or not, revocable at pleasure.

Next it is said an agreement respecting the maintenance of a public nuisance is void. Granted, but this action concerns private rights only.

Next it is contended that the doctrine of estoppel is not applicable to public rights. As said before, the doctrine of estoppel is not vital to this case. This may be taken as a sufficient answer to several contentions on the subject of estoppel.

Some other suggestions are made in the brief on the part of respondent which do not seem to call for more than passing recognition. No principle is invoked or judicial illustration of any principle which, when examined, impeaches or even questions, so far as we can see, the right of any one to grant away or part with by irrevocable license or lease his mere private rights, as was done in this case, and burden his property so that it will pass thus burdened to his vendee who takes with notice.

The learned circuit judge seems to have placed great reliance on authority that mere acquiescence in the creation of an obstruction in a street will not estop an abutting owner from successfully invoking the court to secure an abatement. That may be, and yet the abutter have no private right of action, especially in equity, where the obstruction is on his own land and was erected under a license or grant in writing. It

seems it was thought that the principle that one cannot make a binding contract as to judicial proceedings involving the public as a party interested, applies in plaintiff's favor. We do not perceive any such connection. The public was in no way prejudiced by the contractual transition of the mere property right. Had no contract with reference to the matter been made and an action been brought to vindicate the private right, the public would not, in any sense, have been a party to the action so as to preclude plaintiff from contractually disposing of the action as he might see fit. There could be no moral turpitude in such a matter as in the instances found in the books illustrative of the principle invoked,—such as a champertous contract, an agreement not to make any defense in a divorce action, and the like. Moreover, the contract here had no reference to an action pending or impending, or threatened or proposed. We apprehend that if a person should make a contract, which would be binding under ordinary circumstances, privileging another to locate a weighing scales or a fruit or news stand on his property within the boundaries of a street, he could not in face thereof successfully prosecute such other for trespassing upon his premises. A person's mere property right in the street is his to enjoy or part with as freely as any other such right.

The trial judge evidently relied on *Amestoy v. Electric R. T. Co.* 95 Cal. 311, 30 Pac. 550, and was misled thereby. That was an action to recover the promised compensation for not prosecuting defendant for an unlawful obstruction of the street. The judgment below went in favor of defendant for insufficiency of the complaint. It was affirmed upon appeal solely upon the ground that the pleading failed to show plaintiff had such special interest as to render him competent to sue the defendant for a private wrong, and, therefore, the case was to be viewed upon the theory that the agreement was not to sue to vindicate the public right and that such an agreement is against public policy. Inferentially, the court held

that if the pleading disclosed that plaintiff contracted with reference to his mere private right as an abutter on the street the suit would be maintainable. That must be so, it seems, in case of an executed contract, and especially must the doors of equity be closed against a person who seeks to use its jurisdiction to enable him to successfully repudiate his having surrendered or burdened his mere private right.

By the Court.—The judgment is reversed, and the cause remanded with directions to dismiss the complaint with costs.

SIEBECKER and TIMLIN, JJ., dissent.

A motion for a rehearing was denied April 5, 1911.

WILL OF POWERS: POWERS, Appellant, vs. POWERS and others, Respondents.

March 14—April 5, 1911.

Appeal from county court: "Person aggrieved:" Lost will.

1. Only those persons authorized by sec. 4031, Stats. (Laws of 1907, ch. 593), may appeal from the county court.
2. One who claims that she was named as executrix in a lost will but fails to show that she was so named is not, merely by reason of such claim, a "person aggrieved" by the judgment refusing to admit such will to probate, so as to entitle her to appeal therefrom.

APPEAL from a judgment of the circuit court for Columbia county: CHESTER A. FOWLER, Circuit Judge. *Dismissed.*

The appeal is from a judgment refusing to admit to probate a will of Patrick Powers, deceased, alleged to have been lost. The trial court found as facts:

"1. That Patrick Powers, a resident of the town of Elba, Dodge county, Wisconsin, died at said town on January 24,

1908, owning estate to be administered therein; that he was a bachelor, about seventy-five years of age, and had long resided in said town; that he left surviving his next of kin and heirs at law three brothers and two sisters, viz.: *Michael, Thomas,* and James Powers and *Mary Hollihan* and Anastasia Rooney, and the children of three deceased brothers, viz.: William N., Christopher C., and Margaret Ann Powers, children of Nicholas Powers, deceased, who was a brother of said Patrick Powers; and Esther Cotter, Margaret, Winnifred, William, Thomas, John, James, Stephen and Nicholas Powers, children of Morris Powers, deceased, who was a brother of said Patrick Powers; and Margaret and Nellie Powers, children of William Powers, deceased, who was a brother of said Patrick Powers.

"2. That said *Sarah C. Powers,* widow of said Nicholas Powers, deceased, and the mother of his said children, in April, 1908, presented her petition to the county court of Dodge county, wherein she prayed the court to take proof of the execution and validity of a will of the decedent alleged to be lost or destroyed, by accident or design, and for the admission of said will to probate as the last will and testament of Patrick Powers, deceased; that the contestants herein appeared in opposition thereto; that at the conclusion of the trial of said issues, said court found adversely to the petitioner and entered judgment denying her petition.

"3. That the said *Sarah C. Powers* appealed from said decision and judgment to the circuit court of said county on the ground that she is the executrix named in said lost will and was aggrieved by said judgment; that thereafter said *Sarah C. Powers* filed an affidavit of prejudice on the part of the presiding judge of the circuit court for Dodge county, and thereupon, and by order of said court, the place of trial of this action was duly changed to the circuit court in and for Columbia county.

"4. That said Patrick Powers, deceased, did on or about the 18th day of December, 1888, make, execute and publish his will; that he was then ill at the home of *Sarah C. Powers,* but was competent to make a will.

"5. That Henry A. Hills, a farmer and next-door neighbor, acted as scrivener in the making of said will, and it was witnessed by him and by James Powers, a brother of the decedent.

"6. That said will contained a legacy to the testator's brother, James Powers, but that the amount and terms of said legacy are uncertain. There was a bequest made to the church of Elba, or to some priest, it does not appear to which, but the amount of said legacy is wholly unproved; that the children of said *Sarah C. Powers* were made residuary legatees and devisees with some provision, which is wholly undisclosed, regarding the time when they should take; that the contents of said will are not proved or established with sufficient certainty to enable the court to determine what its terms and conditions actually were; that it cannot be determined with reasonable certainty if any one was named as executrix in the will.

"7. That, at the time of its execution, said will was not left in the custody of said Mr. Hills, nor was it ever thereafter in his custody; that the decedent, Patrick Powers, kept the will in his own possession at the time of its execution, and that it was never thereafter in the possession of any other person.

"8. That the testator, the said Patrick Powers, destroyed said will with intention to revoke the same."

From a judgment affirming that of the county court of Dodge county, the proponent, *Sarah C. Powers,* appealed.

William N. Powers, for the appellant.

For the respondents there was a brief by *E. E. Brossard,* attorney, and *F. J. Colignon,* of counsel, and oral argument by *Mr. Brossard.*

VINJE, J. At the threshold of the case we are met with the contention of the respondents that the appellant has no appealable interest and therefore her appeal to the circuit court should have been dismissed, as should be the appeal to this court. The grounds upon which such contention is based are that the right of appeal is governed by sec. 4031, Stats. (1898), as amended by ch. 593, Laws of 1907, providing that "any executor, administrator, guardian, trustee or any person aggrieved by any order, judgment, decree, determination or denial of the county court may appeal therefrom to the circuit court;" that since she has not only not been ap-

pointed executrix, but the will has not been admitted to probate, she cannot appeal as executrix, and as she is not an heir or legatee she is not a person aggrieved by the judgment sought to be appealed from. That she cannot appeal as executrix must be conceded, for upon the record as it stands she has not been appointed such, the proposed will has been refused probate, and the trial court found that it could not be determined with reasonable certainty that any one was named as executrix in the will. It therefore remains to consider whether or not she is a person aggrieved by the judgment within the meaning of the statute cited, as that has been held to be exclusive on the question as to who may appeal from the county court to the circuit court. *In re Guardianship of McLaughlin,* 101 Wis. 672, 78 N. W. 144; *Sanborn v. Carpenter,* 140 Wis. 572, 123 N. W. 144. It has likewise been held that the right of appeal, irrespective of statute, is not in every party to a judgment, but is confined to parties aggrieved in some appreciable manner thereby. *Larson v. Oisefos,* 118 Wis. 368, 95 N. W. 399. And if the appellant cannot show his right to prosecute the appeal by statutory provisions or by the fact that he is aggrieved by the decision involved, the proper practice is to dismiss the appeal. *Amory v. Amory,* 26 Wis. 152; *Larson v. Oisefos, supra.* It is not necessary in this case to determine whether or not one *actually named* as executor in a will that is refused probate is a person "aggrieved" within the meaning of the statute and entitled to an appeal. Here the appellant has failed to show that she was named as executrix, and the only ground upon which she bases her right to appeal is the fact that she *claims* she was so named. Such a claim does not bring her within the statute. It does not appear from the record that she is now anything more than a stranger to the proceedings, or that any legal right of hers has been adversely affected by the judgment. The mere fact that she may have a strong natural desire to reverse it, or that she has been affronted or in-

jured in her feelings by the rendition thereof, is not sufficient. *Sanborn v. Carpenter,* 140 Wis. 572, 123 N. W. 144. Nor does the fact that she could properly arouse the jurisdiction of the county court in the first instance entitle her to appeal. *Ibid.* The appeal must therefore be dismissed on the ground that the appellant has no appealable interest.

By the Court.—Appeal dismissed, and cause remanded with directions to dismiss the appeal from the county court.

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APPEAL AND ERROR.

Jurisdiction.

1. Where in a condemnation action to which receivers of the railroad company had been made parties defendant judgment was rendered in terms against the defendant company, a notice of appeal by the receivers, properly entitled in the action and giving the date and amount of the judgment but referring to it

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3. Only those persons authorized by sec. 4031, Stats. (Laws of 1907, ch. 593), may appeal from the county court. *Powers v. Powers,* 671

4. One who claims that she was named as executrix in a lost will but fails to show that she was so named is not, merely by reason of such claim, a "person aggrieved" by the judgment refusing to admit such will to probate, so as to entitle her to appeal therefrom. *Ibid.*

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5. Exceptions to rulings of the trial court admitting evidence are not available on appeal if no exception was taken to the refusal to grant a new trial. *Kopplin v. Quade,* 454

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9. Failure of the trial court to make such findings of fact as are required by sec. 2863, Stats. (1898), is error, but does not necessarily lead to reversal. *Damman v. Damman,* 122

10. General findings of the trial court are not within the rule that the decision of such court with respect to disputed matters of fact will not be disturbed on appeal unless against the clear preponderance of the evidence. *Ibid.*

11. In the case of general findings the appellate court may affirm the judgment if clearly supported by preponderance of the evidence;

reverse it if not so supported, ordering judgment in accordance with what appears to be the preponderance; or, if that course seems to present peril of injustice, may remand for further trial and findings. *Ibid.*

12. A divorce action in which many witnesses testified on each side and the conflict in their testimony was such as hardly to be accounted for except on the theory that those on the one side or the other were lying, is *held* to be a case in which this court should have the full benefit of specific findings by the trial court, and should not attempt to determine, in the first instance, from the printed record whether or not the preponderance of evidence sustains the judgment. *Ibid.*

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13. If, in any reasonable view of the evidence in any case, the jury could honestly have come to the conclusion complained of, the judgment cannot properly be disturbed on appeal, even though from the record alone the major probabilities may appear otherwise to the reviewing court. *Holway v. Sanborn,* 151

14. A verdict will not be disturbed on appeal for lack of evidence if there is any credible evidence to support it. *Smith v. Peterson,* 284

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15. A judgment upon a directed verdict, though not sustainable upon the precise ground upon which the trial court rested it, will be affirmed if it appears from the record that the evidence would not have warranted a different verdict. *Falkenstern v. Greenfield,* 232

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16. Legal propositions upon which the decision of the supreme court was based in the opinion on a former appeal are, whether right or wrong, the law of the case upon subsequent trials or appeals. *Jeffery v. Osborne,* 351

17. *It seems,* as an original proposition, that if lack of opportunity for expansion be a proper element to consider in estimating damages to a manufacturing plant a part of whose land is taken for railroad purposes, evidence that other adjoining land was readily purchasable, or was in fact purchased, at moderate cost, upon which the plant could be enlarged, would be admissible and proper to be considered by the jury to mitigate such damages. *Ibid.*

18. But where, upon a former trial, the railroad company procured an option upon adjoining land and tendered it to the owner of the plant to replace the land taken, and the supreme court on appeal from the judgment sustained the trial court's rejection of the offer on the ground that it was not material that plaintiff could move his plant to other land, or, in effect, swap land for the accommodation of the railroad company, the question was foreclosed on the second trial, and proof of the availability and price of adjoining land was not admissible. *Ibid.*

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ASSIGNMENT FOR BENEFIT OF CREDITORS.

Void conditional sale: Rights of assignee.

Where a contract of conditional sale of goods by which the vendor retains title is void under sec. 2317, Stats. (1898), as to the creditors of the vendee, it is void as to his assignee for the benefit of creditors under sec. 1693c, Stats. (Supp. 1906: Laws of 1901, ch. 207), and such assignee is entitled to possession of the property as against the vendor. *Mishawaka Woolen Mfg. Co. v. Teasdale,* 73

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1. The possession of a bailee and his duty to account for the property need not be based upon a contract *inter partes*, but may result from the operation of law. *Burns v. State,* 373

2. A constable who, upon taking an insane man in charge after a pursuit, received from one of the pursuers a roll of money which had been thrown away by the man in his flight, became thereby a bailee of such money; and where such facts were undisputed upon the trial of the constable for larceny of the money under sec. 4415, Stats. (1898), the court properly instructed the jury that if the accused converted any of such money to his own use he did so as bailee. *Ibid.*

3. Sec. 4415, Stats. (1898), abolishes the distinction between conversion by a bailee of an entire thing and the unlawful breaking of a package and conversion of part or all of the contents, each of such acts differing from ordinary larcenies by the absence of the element of trespass in gaining original possession; so that where the evidence shows the breaking of a package of money and the extracting therefrom of a part of the contents, acquittal of the accused under a count charging larceny of the money is not inconsistent with his conviction, under another count, of the statutory offense of larceny by a bailee. *Ibid.*

BANKRUPTCY.

Although the federal rule, when unaffected by statute, is that a trustee in bankruptcy takes only the title and rights of the bankrupt, yet where by state law a transfer or incumbrance is void as to the creditors the trustee succeeds to the rights of any creditor qualified to avoid such transfer or incumbrance, the federal courts being controlled in such cases by the state statute and the interpretation given it by the highest court of the state, unless affected by the peculiar provisions of the bankruptcy act itself. *Mishawaka Woolen Mfg. Co. v. Teasdale,* 73

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BILLS AND NOTES.

Liability of one signing after maturity.

1. One who, after maturity of a note executed by another person and in consideration of the extension of the time for payment, signs the same as maker, thereby adopts the terms of the note and becomes bound by it,—the recital in the note, "for value received," being a sufficient compliance with the statute of frauds (sec. 2307, Stats. 1898) as to expressing the consideration. *Jansen v. Kuenzie,* 473

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Collateral security: Liability of indorser of collateral.

2. The indorsement and delivery of a note, by the payee to a third person, before maturity, as collateral security, with waiver of demand and notice of nonpayment, amounts to an absolute agreement on his part to pay the note at maturity if the maker fails to do so. *Bryden v. Cairncross,* 478

3. Where a note is so indorsed and delivered as collateral security to a debt of the indorser, it is no defense to an action upon the principal debt that the plaintiff failed to enforce collection of such collateral note, since defendant was under contract to pay it and might then enforce it himself. *Ibid.*

4. Where a debt of $2,000 was secured by mortgage of real estate worth $11,500, including a homestead worth $9,000, and also by a note for $500 subsequently given as collateral, on which the mortgagor was liable as indorser,—the mortgaged land being thus ample to pay the judgment on foreclosure and still leave the $5,000 homestead exemption intact,—there was no reason why the mortgagee, seeking to foreclose, should be compelled to exhaust first his remedy against the maker of the collateral note, either to exonerate the realty as a whole or to save the homestead. *Ibid.*

5. The fact that the homestead had been conveyed by the mortgagor to his wife subsequent to the mortgage furnished no reason for compelling the mortgagee to exhaust his remedy on the collateral note in order to preserve her rights, especially where she not only signed the mortgage, but afterwards, when plaintiff purchased it, signed a declaration stating the amount due thereon and that it was a valid lien on the property, and in her answer alleged that said collateral note was her separate property. *Ibid.*

6. If the maker of the collateral note had a defense thereto which was not available against the indorsee as a *bona fide* holder, that would furnish an additional reason why the latter should not and perhaps could not be compelled to enforce collection of it until the remedy on the mortgage was exhausted. *Ibid.*

Payment. See EVIDENCE, 5.

BOUNDARIES.

1. Evidence of early landmarks, blazed lines, and bearing trees now destroyed is *held* to sustain the location of a quarter-section corner in accordance therewith, and not as a lost corner, although the quarter-post itself had disappeared and such location resulted in throwing into the west half of the section nearly the whole of an overrun or surplus of about five chains in the south line of the section. *Suring v. Rollman,* 490

2. Where plaintiff owned lands adjoining a certain quarter-section line on the west, and defendants made and recorded a plat of lands purporting to adjoin the same line on the east, but in fact, owing to a dispute as to the true location of the quarter-section corner, the plat as located and staked out on the ground encroached upon plaintiff's land, and defendants were claiming title to the strip in question and were selling parts of it to others, an action would lie under sec. 3186, Stats. (1898), to remove a cloud from plaintiff's title, if such disputed strip was either in his actual possession or vacant. *Ibid.*

3. Even if there was a misjoinder of causes of action in a complaint *quia timet* against one defendant not in possession and another in possession of a part only of the land in dispute, the error in overruling a demurrer on that ground will not, under sec. 3072*m*, Stats. (Laws of 1909, ch. 192), be cause for reversal after a trial on the merits, unless some substantial right of the appealing defendants has been affected thereby. *Ibid.*

4. Under the circumstances above stated there is a good cause of action in equity, independent of sec. 3186, Stats. (1898), to remove the cloud upon plaintiff's title caused by the recording of defendant's plat. Though such plat purports to cover only land east of plaintiff's line, yet its effect as a claim of title, when construed in connection with its accompanying survey, extends to the corners and boundary lines actually established and marked on the ground. *Ibid.*

5. In such case the plat, being an entirety, can and should be attacked as a whole, and all persons interested in the result of the attack should be made parties, even though their claims be several. *Ibid.*

6. The remedy at law in such a case is not adequate, since the only real and effective relief would be the cancellation of that part of the plat actually located upon the plaintiff's land and of the conveyances of lots according to the plat so far as they affect such land. *Ibid.*

BRIDGES.

See EVIDENCE, 7.

Under sec. 1319, Stats. (1898), the county board has no power to levy a general county tax to pay one half of the cost of a town

bridge, upon a petition filed by the town board after the bridge has been constructed, even though two members of the county board, theretofore appointed by the chairman, acted with the town board in the letting, inspecting, and acceptance of the work. *State ex rel. Hamburg v. Vernon County,* 191

BROKERS.

Middlemen: Commissions from both parties.

1. A broker who undertakes merely to procure a purchaser for land at a price fixed by the seller is in reality only a middleman and is entitled to the agreed commission for such service even though, by an agreement unknown to the seller, he is also to receive a commission from the purchaser. *Tasse v. Kindt,* 115

2. Brokers who, in procuring a purchaser for land, acted as middlemen only and not as agents of the vendor, are entitled to the agreed commission for such service, even though they were also employed by and received a commission from the purchaser. *Litts v. Morse,* 472

BURDEN OF PROOF. See INSTRUCTIONS TO JURY, 5–8. MASTER AND SERVANT, 39–41. TRIAL, 14.

CANCELLATION OF INSTRUMENTS. See BOUNDARIES, 6. QUIETING TITLE.

CANVASS OF VOTES. See ELECTIONS.

CARRIERS.

Rates: Regulation.

1. Until the state sees fit to interpose, a carrier may ordinarily exercise a free hand in fixing rates, subject to the qualification that such rates must not be unreasonably high nor unjustly discriminatory, and may enter into a binding contract on the subject with the municipality from which it receives a franchise. *Manitowoc v. Manitowoc & Northern T. Co.* 13

2. Statutes granting to cities the right to make long-time contracts binding on the public and fixing rates to be charged by public-service corporations are not looked upon with favor and will be strictly construed. *Ibid.*

3. Where no specific authority had been conferred upon a city to make such a contract, the contract will remain valid between the parties until the state sees fit to exercise its paramount power to fix the rates, and no longer. *Ibid.*

4. The governmental power of the state to fix rates was not surrendered by the enactment of sec. 1862, Stats. (1898), or sec. 1863, Stats. (Supp. 1906: Laws of 1901, ch. 425). *Ibid.*

5. The right conferred on a railway corporation to use the public streets, under either of said sections, becomes one of the corporate franchises of the corporation, the city acting as the delegated agent of the state in granting it; and, this being so, sec. 1, art. XI, Const., would seem to empower the legislature to modify the conditions on which such franchise was given, as well as to repeal or amend the franchise itself. *Ibid.*

6. Ch. 362, Laws of 1905, which is applicable to interurban railways, did not of its own force work any change in existing rates, and hence did not supersede an ordinance contract by which an interurban railway company was given the right to use the pub-

lic streets of a city upon condition that a certain rate be charged; though under said statute such rate might be superseded by a determination by the railroad commission. *Ibid.*

7. A rate which is unreasonably low can be corrected in such a case as well as one which is unreasonably high; but until affirmative action is taken by the railroad commission the courts cannot relieve a carrier from an improvident contract. *Ibid.*

Carriage of goods: Garnishment. See GARNISHMENT, 2.

CATTLE. See ANIMALS.

CATTLE-GUARDS. See RAILROADS, 15.

CERTIFICATION. See JUDGMENT, 14.

CHATTEL MORTGAGES.

Validity. See CORPORATIONS, 2.

Foreclosure: Sales. See CORPORATIONS, 2.

1. Sec. 2316*a*, Stats. (1898), which prohibits a sale of property taken under a chattel mortgage before the expiration of five days from the time of taking, does not apply where the mortgagor consents to an earlier sale, such a case being expressly excepted. *F. A. Patrick & Co. v. Deschamp,* 224

2. The requirement of sec. 2316*c*, Stats. (Supp. 1906: Laws of 1903, ch. 122), that when property is taken and sold under a chattel mortgage the mortgagee shall within ten days after the sale file in the town clerk's office an affidavit giving the particulars of the sale, applies only where the property has been taken *in invitum* and not where the mortgagor consents to the taking. *Ibid.*

3. A chattel mortgagee may, after taking the property, restore it to the possession of the mortgagor under an agreement that the proceeds of sales thereof shall first be applied upon an unsecured debt; and such arrangement is not invalid because the mortgagee is a foreign corporation and has not complied with sec. 1770*b*, Stats. (1898), if the agreement was made in a *bona fide* attempt to give on the one side, and receive on the other, security for the payment of an indebtedness resulting from interstate sales of goods. *Ibid.*

CIRCUMSTANTIAL EVIDENCE. See EVIDENCE, 1, 2.

CITIES. See MUNICIPAL CORPORATIONS.

CLOUD ON TITLE. See BOUNDARIES, 2–6.

COGNOVIT. See JUDGMENT, 1–11.

COLLATERAL ATTACK. See JUDGMENT, 5, 9.

COLLATERAL SECURITY. See BILLS AND NOTES, 2–6.

COMITY. See JUDGMENT, 13, 14.

COMMERCE. See CHATTEL MORTGAGES, 3. CORPORATIONS, 1, 2.

COMMERCIAL PAPER. See BILLS AND NOTES. EVIDENCE, 5. JUDGMENT, 8.

COMMISSIONS. See BROKERS. MASTER AND SERVANT, 2.

COMMON LAW.

See ANIMALS, 1. JUDGMENT, 1, 2. NUISANCE, 1. PAYMENT, 2.

Viewed objectively and at large as a system of principles deducing from litigated instances just, reasonable, and consistent rules of

decision suitable to the genius of the people and to their political, social, and economic conditions, the common law never changes; but the rules so deduced are subject to change in detail to conform with progress and change in such conditions. *Metropolitan Casualty Ins. Co. v. Clark,* 181

COMPARATIVE NEGLIGENCE. See RAILROADS, 23.

COMPENSATION. See RECEIVERS, 2–4.

COMPETENCY. See INSURANCE, 3. JURY, 1–3. PARTNERSHIP, 2. PAYMENT, 7. RAILROADS, 25. SALES, 4. TRUSTS AND TRUSTEES, 1. WITNESSES, 1–10.

COMPLAINT. See BOUNDARIES, 3–6. MUNICIPAL CORPORATIONS, 28, 29. NUISANCE, 2. PLEADING, 1, 2, 5, 6. STATES, 3.

CONDEMNATION. See APPEAL, 1. EMINENT DOMAIN. INSTRUCTIONS TO JURY, 9. WITNESSES, 2.

CONDITIONAL SALES. See ASSIGNMENT FOR BENEFIT OF CREDITORS.

CONDUCTOR. See RAILROADS, 17, 19.

CONFESSION of judgment. See JUDGMENT, 1–11.

CONSIDERATION. See BILLS AND NOTES, 1. MUNICIPAL CORPORATIONS, 34.

CONSTABLES. See BAILMENT, 2.

CONSTITUTIONAL LAW.

Legislative powers: Delegation. See CARRIERS, 5. RAILROADS, 3, 14.

1. An option law, to be valid, must be a complete enactment in itself when it leaves the legislature and require nothing to perfect it as a law, the only thing left to the people to determine being whether they will avail themselves of its provisions. *Holt Lumber Co. v. Oconto,* 500
2. The general city charter is an option law in that any city may adopt it or a part of it, but there is no option in the administration of the law after its adoption. Where a city has adopted a particular subchapter, it is bound thereby and cannot abrogate it or any of its provisions. *Ibid.*

Taxation. See MUNICIPAL CORPORATIONS, 27.

Police power. See RAILROADS, 14.

Personal rights: Trial by jury.

3. Ch. 218, Laws of 1899, accords to the accused the privilege of a trial by a lawful jury and does not deny to him any constitutional right in respect thereto. *State ex rel. Sullivan v. District Court,* 138
4. The fact that said act provides that the fees of jurors shall be taxed as costs in the action, and in case of conviction taxed against the accused, does not invalidate it, the subject of costs and the items thereof being largely a matter of legislative discretion. *Ibid.*

Vested rights. See INJUNCTION.

Cruel and unusual punishments. See RAPE, 6.

CONTEMPT. See JURY, 5.

CONTRACTS.
Requisites and validity. See MASTER AND SERVANT, 1–3. MUNICIPAL CORPORATIONS, 22–36.
Construction. See MINES AND MINERALS. SALES, 1, 2.
Assignment. See MUNICIPAL CORPORATIONS, 22.

CONTRIBUTORY NEGLIGENCE. See MASTER AND SERVANT, 8, 18, 19, 23, 37–39, 41, 45–47. RAILROADS, 22, 23.

CONVERSION. See PLEADING, 1, 2.

COPY. See JUDGMENT, 14.

CORPORATIONS.

Public-service corporations. See CARRIERS. RAILROADS, 1–14.

Foreign corporations. See CHATTEL MORTGAGES, 3. GARNISHMENT, 1.

1. Sec. 1770*b*, Stats. (1898), has no application to transactions of interstate commerce, the exclusive power to regulate which is vested in Congress. *F. A. Patrick & Co. v. Deschamp,* 224
2. If a foreign corporation sells goods and delivers them from its place of business outside of the state to a customer within the state, the subsequent taking of a chattel mortgage on property within the state, to secure payment of the purchase price of such goods, and the sale on foreclosure of the mortgaged property, are incidents of the transaction and included in the scope of the term "interstate commerce." *Ibid.*
3. A conveyance of land in this state to a foreign corporation which has not complied with sec. 1770*b*, Stats. (1898), is not merely voidable at the election of the state, but is absolutely void and a nullity; and any party in interest may take advantage of that fact. *Hanna v. Kelsey Realty Co.* 276
4. A foreign corporation which has no right to acquire property in this state cannot have the benefit of our recording statute (sec. 2241, Stats. 1898); and although a mortgage was unrecorded, the failure or delay of the mortgagee to take steps to give notice of his rights to persons who might purchase the land does not estop him to assert the invalidity of a conveyance to a foreign corporation which had not, at the time of such conveyance, complied with sec. 1770*b*, Stats. (1898). *Ibid.*

COUNSEL FEES. See RECEIVERS, 4.

COUNTY TAX. See BRIDGES.

CREDIBILITY. See WITNESSES, 12.

CRIMINAL LAW AND PRACTICE.

Nature and elements of crime. See FOOD. PROHIBITION. RAPE.

Preliminary examination. See PROHIBITION.

1. Under sec. 4654, Stats. (1898), the objection that the evidence before the examining magistrate was insufficient to warrant a finding of probable cause to believe defendant guilty can be taken at the trial only by a plea in abatement. *Birmingham v. State,* 90

Trial: Reception of evidence. See RAPE, 1–4.

Appeal and error: Review. See RAPE, 2–4.

2. Incompleteness of the charge of the trial court in a criminal case is not ground for reversal, where no instructions were asked by defendant. *Birmingham v. State,* 90
3. Where there is credible evidence to support the verdict of guilty and the trial court has refused to set it aside, this court will not disturb it. *Ibid.*
4. The rule that the finding of a jury must be regarded as a verity on appeal if in any reasonable view of the evidence such a conclusion could have been arrived at, applies to verdicts in criminal cases. *Smith v. State,* 612
5. Where objection to use by the state of a deposition taken on behalf of the accused was not insisted upon at the trial, and no exception was taken to the ruling permitting such use, the objection is not available on writ of error. *Ibid.*
6. A deposition taken on behalf of accused and placed and left on file, whether offered by him or not, may be used against him—he having to that extent waived his right to meet the witness face to face. *Ibid.*
7. The defendant in a criminal action may waive any right except his right to a trial by twelve jurors. *Ibid.*
8. Under sec. 2829, Stats. (1898), no judicial determination, whether in a civil or criminal case, will be disturbed on purely technical grounds, or on any grounds not substantially and unjustly affecting the party complaining, unless the written law so provides. *Ibid.*
9. The question whether evidence offered to show guilty intent could reasonably be considered as tending to prove such intent is largely a matter of judgment, and a ruling of the trial court thereon will not be disturbed except for manifest error. *Ibid.*

DAMAGES.

Grounds and subjects of compensatory damages. See FRAUD, 2–4.

Measure of damages. See APPEAL, 17, 18. EASEMENTS. EMINENT DOMAIN. INSTRUCTIONS TO JURY, 9. TRESPASS, 3, 5–7. TRIAL, 1, 12.

1. The value which measures the damages recoverable for wrongful destruction of property is the reasonable or market value, which means simply that reasonable sum which the property would probably bring on a fair sale by a man willing but not obliged to sell to a man willing but not obliged to purchase. *Allen v. Chicago & N. W. R. Co.* 263
2. In the case of property not frequently bought or sold, for which there may be said to be no market, the rules governing the admission of evidence of value are somewhat elastic, and something must be left to the discretion of the trial judge. *Ibid.*
3. In such a case the price paid for the property may be shown if the purchase was made shortly before the loss; but where, as in this case, it appears that the greater part of the property had been purchased four years before and had been through one fire, evidence of the purchase price is not admissible. *Ibid.*
4. Where, as the result of a trespass by defendant's common bull, plaintiff's thoroughbred heifer was delivered of a calf begotten

by said bull, the measure of damages was the difference in the value of the heifer to plaintiff before and after the trespass, in view of the uses which he intended to make of her. *Kopplin v. Quade,* 454

5. It appearing that plaintiff was keeping the heifer for breeding purposes and intended to breed her to his registered thoroughbred bull, one element of the damages was the difference between the value of the calf dropped and the value of a calf from the heifer if bred to plaintiff's bull; and evidence of such difference was not objectionable on the ground of remoteness. *Ibid.*

6. The measure of the vendor's damages for refusal of the vendee to accept goods is the difference between the contract price and the market value at the time of delivery fixed by the contract. *Carle v. Nelson,* 593

7. Market value is fixed by sales made at or about the time in question, and evidence of the price fixed in specific contracts entered into in the past is not competent. *Ibid.*

8. Where a witness who had raised and sold eighteen crops of tobacco testified that he did not know the price tobacco was sold for at the time in question, but also testified that he knew what others were getting for tobacco at that time, although he did not really know it was the market value, it was proper to receive his testimony as to market value. *Ibid.*

9. Where, after refusal of the vendees to receive his tobacco, the vendor sold the same for the best price obtainable in the vicinity, using all reasonable efforts to that end, the price so obtained settles the question of market value and furnishes the basis for measuring the vendor's damages. *Ibid.*

Excessive damages. See EMINENT DOMAIN, 2.

10. The plaintiff, in an action where there has been a trial and an excessive verdict, may be permitted to take judgment for a less sum without consent of the defendant, without prejudicing the latter's right of a jury trial, if the optional amount be placed as low as any jury of fair men rightly instructed would within a reasonable probability place it. *Willette v. Rhinelander Paper Co.* 537

11. In case of an injury to a man of forty-five years of age, under the facts, stated in the opinion, an award of $4,500 is clearly excessive. *Ibid.*

12. For an injury resulting in loss of an arm and in great pain and suffering, an award of $6,975, approved by the trial judge, is *held* not so excessive that it should be set aside by this court. *Schmolt v. H. W. Wright Lumber Co.* 577

13. An award of $2,800 to a young man eighteen years old, for an injury resulting in the loss of the forefinger and partial crippling of the middle finger of the left hand, though regarded as large, is sustained on appeal, the trial court having refused to reduce it. *Schweikert v. John R. Davis L. Co.* 632

DAMS. See EVIDENCE, 7. NUISANCES, 2. WATERS AND WATERCOURSES.

DEBTOR AND CREDITOR. See ASSIGNMENT FOR BENEFIT OF CREDITORS. BANKRUPTCY. GARNISHMENT. GUARANTY. HOMESTEAD. INTEREST. JUDGMENT. PAYMENT.

DECEDENTS. See WITNESSES, 9.

DEEDS.

Requisites and validity. See MUNICIPAL CORPORATIONS, 31–37.

Construction. See PARTIES. WATERS AND WATERCOURSES, 1.

Instruments formally executed under seal, though not containing technical words of grant, should be construed as such when necessary to effect their manifest purpose. *Walterman v. Norwalk,* 663

DELEGATION OF LEGISLATIVE POWER. See CARRIERS, 5. CONSTITUTIONAL LAW, 1, 2. RAILROADS, 3, 14.

DELIVERY. See SALES, 5, 6.

DEMURRER. See MUNICIPAL CORPORATIONS, 28. PLEADING, 3–6.

DEPOSITIONS. See CRIMINAL LAW, 5, 6.

DETECTIVES. See MUNICIPAL CORPORATIONS, 2.

DEVISES. See WILLS, 1, 2.

DIRECTION OF VERDICT. See APPEAL, 6, 15. TRIAL, 2–6.

DISCHARGE. See GUARANTY, 3. MASTER AND SERVANT, 1–3.

DISCRETION. See APPEAL, 19. DAMAGES, 2. DIVORCE, 2, 3. JUDGMENT, 11. NEW TRIAL. WITNESSES, 1.

DISMISSAL AND NONSUIT.

See APPEAL, 19.

Where, after commencement of an action to determine the ownership of corporate stock held by defendant and claimed by plaintiff, the stock was transferred to plaintiff pursuant to an agreement that he should pay therefor if defendant was found to be the owner and that the action should proceed to determine the rights of the parties, the controversy remained and defendant was not entitled to dismissal of the action. *Nelson v. Kress,* 38

DISSOLUTION. See PARTNERSHIP, 5.

DIVORCE.

Alimony.

1. The decision of the trial court in the allowance of alimony will not be disturbed on appeal unless manifestly unjust. *Newton v. Newton,* 261
2. Reduction of alimony in this case from the original allowance of $23 per month to $18 per month is *held,* upon the proof, not an abuse of discretion or manifestly unjust. *Ibid.*
3. Where a divorce was granted to the wife on the ground of cruel and inhuman treatment, and the husband was found to be worth $100,000 over and above his debts and to have an income from his profession of $8,000 per year, a final division of the property awarding to the wife $23,000, together with the household furniture, is *held,* upon appeals by both parties, to have been, under all the circumstances (more fully stated in the opinion), a proper exercise of judicial discretion. *Minahan v. Minahan,* 514

Operation and effect of foreign judgment.

4. Where both husband and wife are residents of this state, any decree of divorce by a court of another state can have no validity. *H. W. Wright Lumber Co. v. McCord,* 93

Estoppel by judgment. See ESTOPPEL, 3.

DOWER. See ESTOPPEL, 3.

EASEMENTS.

See MUNICIPAL CORPORATIONS, 36.

Where, by the wrongful obstruction of a lane through which he had a right to travel, one has been deprived of access to his farm land which he was using himself, his right to recover is not limited to the difference between the rental value of the land with the lane open and its rental value with the lane closed, but he is entitled to fair and reasonable compensation for his actual loss proximately caused by the wrongful act, including loss of the use of the land and loss of crops and pasturage. *Weller v. Heimbruck*, 217

ELECTION OF REMEDIES. See BILLS AND NOTES, 4–6. PLEADING, 4.

ELECTIONS.

Count of votes: Return and canvass.

[1. Whether, after the board of state canvassers has determined the result of an election, issued its certificate of election, and adjourned *sine die*, it can, by *mandamus* or otherwise, be compelled to reconvene and issue a certificate to another person, not determined.] *State ex rel. Kustermann v. Board of State Canvassers*, 294

2. Under the facts, stated in the opinion, *held*, that the board of state canvassers properly credited one candidate with 1,450 votes, it being obvious on the face of the return that the county canvassers determined that the figures on a tabular statement should be 22 and not 16. *Ibid.*

3. It cannot be said by the court in such case that the county canvassers improperly made up the tabular exhibit; but, in the absence of evidence to the contrary, it must be presumed that they performed their duty and determined the correct vote in the manner provided by law. *Ibid.*

4. The memorandum on the tabular statement, referring to the tally sheet, if evidence of anything, is not evidence that the board of county canvassers followed the tally sheet. *Ibid.*

5. It is the duty of the board of state canvassers to canvass from the regular returns before them, and they cannot go behind the returns. *Ibid.*

6. Whatever may be the power of the supreme court under sec. 3452, Stats. (1898), such power will not be exercised in a case involving the election of a representative in Congress where a certificate of election has already been issued to one of the candidates and the inquiry could not be completed before his term of office would have begun, when, in any event, the ultimate decision of the right to the seat must rest with the House of Representatives itself. *Ibid.*

ELECTRICITY. See MUNICIPAL CORPORATIONS, 3.

EMINENT DOMAIN.

Parties. See APPEAL, 1.

Compensation: Measure and amount. See APPEAL, 17, 18. INSTRUCTIONS TO JURY, 9. WITNESSES, 2.

1. It is settled law in this state that in awarding damages for the taking of land for railroad or highway purposes the strip taken

is to be valued as part and parcel of the entire tract of which it formed a part; that the landowner is entitled to recover the difference between the fair market value of the whole property before the taking and the value of what remains after the taking; and that the actual use and intention of the proprietor is to be considered as well as the adaptability of the property for some other use in future. *Jeffery v. Osborne*, 351

2. In a proceeding to condemn land for a railroad, the juries in two successive trials having awarded substantially the same amount of damages, which, though large, is supported by ample evidence, the court declines to interfere on the ground that the award is excessive. *Ibid.*

EQUITY.

Jurisdiction. See BOUNDARIES, 4–6.

Principles: Adequate remedy at law. See PARTNERSHIP, 4, 5.

Same: Innocent purchaser.

As between two equally innocent parties, equity demands that that one shall suffer whose conduct has placed it in the power of a wrongdoer to deceive the other. *H. W. Wright Lumber Co. v. McCord*, 93

ESTIMATES. See SALES, 1.

ESTOPPEL.

See CORPORATIONS, 4. LIMITATION OF ACTIONS, 1, 2. MUNICIPAL CORPORATIONS, 37. RECEIVERS, 3. REPLEVIN.

1. In this state the doctrine of equitable estoppel applies as well to married women as to other persons. *H. W. Wright Lumber Co. v. McCord*, 93

2. One who culpably stands by and allows another to contract on the not afterwards dispute the fact in an action against the person faith and understanding of a fact which he can contradict, canwhom he has thus assisted in deceiving. *Ibid.*

3. During many years, and until her husband's death, a wife allowed to go unchallenged his claim that he had procured a divorce, and in silence permitted him to hold out as his lawful wife another woman, whom he had publicly married. She knew that the alleged divorce, if any existed in fact, was invalid, and knew or had good reason to believe that he was engaged in large business transactions and dealing daily with people who in good faith accepted his second marriage as valid; and knew also that it was necessary for the wife to sign conveyances of the husband's real estate, and that such conveyances were probably being signed by the reputed wife and being accepted by the grantees. *Held*, that by such conduct she was estopped, as against the innocent purchasers from the husband, from claiming any dower in lands conveyed by him in his lifetime. *Ibid.*

EVIDENCE.

Presumptions. See ELECTIONS, 3. FRAUD, 5. JUDGMENT, 3. MASTER AND SERVANT, 10. PAYMENT, 1–7.

Burden of proof. See INSTRUCTIONS TO JURY, 5–8. MASTER AND SERVANT, 39–41. TRIAL, 14.

Competency. See INSURANCE, 3. PARTNERSHIP, 2. PAYMENT, 7. RAILROADS, 25. SALES, 4. TRUSTS AND TRUSTEES, 1. WITNESSES, 1–11.

Circumstantial evidence.

1. A jury may draw legitimate inferences from the facts established. *Sanborn v. Walters,* 84
2. A material fact in a civil or criminal case may be established by circumstantial evidence, when the circumstances are such as to lead fairly and reasonably to the conclusion sought to be established. *Ibid.*

Prima facie evidence. See WITNESSES, 4.

Parol or extrinsic evidence affecting writings. See WATERS AND WATERCOURSES, 1.

3. Where there is an entire oral contract and a writing made merely in part execution thereof, the remainder of the contract may be established by parol. *Nelson v. Kress,* 38
4. Where, under an oral agreement, the stock of a corporation, consisting of twenty shares, was to be owned by three persons equally, but a certificate for ten shares was issued to one of them, who was to hold three and one-third shares thereof in trust for the other two, and he gave to them a writing stating, "If I sell *my ten shares* I will pay [the other two persons] the difference in value between one half and one third of the stock," proof of the oral contract, together with such writing, is sufficient to overcome the written evidence (consisting of the stock certificate and records of the corporation) that the holder of the certificate was the absolute owner of the ten shares; and the oral contract shows also that the words "my ten shares" refer merely to the status of the legal title. *Ibid.*

Opinion evidence: Competency of experts. See DAMAGES, 8. MASTER AND SERVANT, 30. WITNESSES, 2–5.

Weight and sufficiency. See BAILMENT, 3. BOUNDARIES, 1. DAMAGES, 9. DIVORCE, 2, 3. EVIDENCE, 4. GUARANTY, 2. MALICIOUS PROSECUTION. MASTER AND SERVANT, 5, 6, 14, 15, 32, 45–47. PAYMENT, 5–7. PRINCIPAL AND AGENT. RAILROADS, 15–19, 25. REPLEVIN. SALES, 3, 4, 7. TELEGRAPHS AND TELEPHONES.

5. A finding by the jury to the effect that a certain payment made upon a promissory note within six years prior to the action was made in part by each of the defendants, is *held* to be sustained by the evidence. *Sanborn v. Walters,* 84
6. Testimony of a witness, even when uncontradicted by any instrument or by other testimony, may be rejected if, in the light of physical situations and matters of common knowledge, it is at variance with the laws of nature. *Falkenstern v. Greenfield.* 232
7. In an action by a millowner against a town for injury to his property by the overflow of a creek, alleged to have been caused by the fact that defendant in building a new bridge across the stream had narrowed the openings which formerly existed for the passage of the water, it is *held,* in view of the physical situation and the laws of nature, that the jury would not have been warranted in finding from the evidence that the change in the bridge was an efficient cause in producing the injury. *Ibid.*

EXCEPTIONS. See APPEAL, 5, 6.

EXCESSIVE DAMAGES. See DAMAGES, 10–13. EMINENT DOMAIN, 2.

EXCISE TAX. See MUNICIPAL CORPORATIONS, 5–14.

EXECUTIONS. See HOMESTEAD.

EXEMPTIONS. See HOMESTEAD.

EXONERATION. See BILLS AND NOTES, 4–6.

EXPERT TESTIMONY. See DAMAGES, 8. MASTER AND SERVANT, 30. WITNESSES, 2–5.

FALSE REPRESENTATIONS. See INSURANCE, 1.

FELLOW-SERVANTS. See MASTER AND SERVANT, 9–12, 42–44.

FIDUCIARY RELATIONS. See MORTGAGES, 1–14. TRUSTS AND TRUSTEES.

FINDINGS. See APPEAL, 9–12. MORTGAGES, 3, 4.

FINES. See STATES, 3.

FIRES. See RAILROADS, 24, 25.

FOOD.

1. One who, for the purpose of delivering or selling to others, selects and collects together articles of food, with opportunity for examination, and thereafter delivers them to guests and patrons, "furnishes" an article so delivered, within the meaning of sec. 4607*d*, Stats. (1898), although throughout the transaction he acts only as the agent of the owner of the food. *Welch v. State*, 86

2. So *held* as to a waiter in charge of a railway lunch counter, who delivered to a patron oleomargarine which had been supplied by the railway company for such counter upon the waiter's requisition for butter. *Ibid.*

3. Where a statute prohibits wilful, intentional, or malicious doing of an act, or where a particular intent is a necessary constituent of a common-law offense, such intent is an essential of guilt; but where a statute commands that an act be done or omitted, which in the absence of the statute might be done or omitted without culpability, ignorance of the fact or state of things contemplated by the statute will not excuse its violation. *Ibid.*

[4. Whether, under such a statute, one could be convicted who had no opportunity to avoid the forbidden act, not determined.] *Ibid.*

FORECLOSURE. See BILLS AND NOTES, 4, 5. CHATTEL MORTGAGES. CORPORATIONS, 2. MORTGAGES, 12–14.

FOREIGN CORPORATIONS. See CHATTEL MORTGAGES, 3. CORPORATIONS. GARNISHMENT, 1.

FOREIGN JUDGMENT. See DIVORCE, 4. JUDGMENT, 6, 7, 10, 12–14.

FORFEITURES. See MINES AND MINERALS, 2–7.

FRANCHISES. See CARRIERS. MUNICIPAL CORPORATIONS, 3–14. QUO WARRANTO. RAILROADS, 2–14.

FRAUD.

See QUIETING TITLE.

1. Mere expressions of opinion as to the value of property offered for sale, even though the estimate be substantially greater than the real value, will not of themselves alone amount to a fraud upon the buyer; but the law requires good faith and that no artifice

or trick be resorted to by the seller to throw the buyer off his guard or prevent inquiry. *Morgan v. Hodge*, 143

2. Although, by a fraudulent conspiracy between the defendants, vendors of a livery stock and business, and plaintiff's partner in the purchase of the same, plaintiff was led to believe that such partner was paying the same price as himself for a half interest therein, when in fact he was paying $1,500 less, plaintiff could not for that reason recover as damages the amount of his loss on a resale of the property, on the claim that if he had known the facts he would not have made the purchase or embarked in the business, such damages not being proximately caused by the act of concealment complained of. *Ibid.*

3. But, plaintiff having given his own note to his partner for $750 under the belief that such partner had contributed $1,500 more than himself toward the purchase, which belief was induced by false representations and the use of a dummy check, he was entitled to be indemnified to that amount for the fraud practiced upon him. *Ibid.*

4. Although plaintiff, after giving the vendors an opportunity to repurchase the property, sold out at a loss to his partner, releasing the latter from liability for the fraud and receiving indemnity against his note to the partner, which had been lost, yet, if in making such sale he was obliged, in the exercise of reasonable diligence, to pay a substantial sum to secure his release from said note, he is entitled to recover that sum from the defendants. *Ibid.*

5. Fraud must be proven with some degree of certainty and cannot be inferred or presumed from ambiguous evidence. *Denoyer v. First National Accident Co.* 450

FRAUDS, STATUTE OF. See BILLS AND NOTES, 1. PARTNERSHIP, 3.

FRAUDULENT REPRESENTATIONS. See INSURANCE, 1.

FREE HIGH SCHOOLS. See SCHOOLS AND SCHOOL DISTRICTS.

GARNISHMENT.

1. If the title to goods sold to a foreign corporation had passed at the time of the service of a garnishee summons upon the purchaser, the garnishment proceeding will not lie, since a credit held in another state cannot be reached. *Kuehn v. Nero*, 256

2. Property delivered by the vendor to a carrier and in transit at the time a garnishee summons is served on the consignee, even if the possession of the carrier is technically that of the consignee, is not "in the hands" of such consignee within the meaning of sec. 3719, Stats. (1898), relating to garnishment in justices' courts. *Ibid.*

GAS. See MASTER AND SERVANT, 15, 16.

GENERAL CITY CHARTER. See CONSTITUTIONAL LAW, 2. MUNICIPAL CORPORATIONS, 24–27.

GUARANTY.

1. The fact that a contract of guaranty in the plural form and having at its foot blanks for the signatures of two guarantors is signed by only one person at the time of its manual tradition,

is not conclusive that it is an incomplete instrument. Upon the evidence in this case the question of the binding effect of such instrument on the signer was for the jury. *First Nat. Bank v. Wunderlich*, 193

2. Where a writing, signed by one person only, in terms guaranteed payment of sums to be advanced by a bank to another person, evidence that the signer afterwards insisted to the cashier of the bank that he had delivered the instrument with the understanding that it was not to become binding until signed by his brother, and that upon being informed as to the amount already advanced on the faith of the guaranty he forbade any further advances, does not show a revocation of the instrument as to sums already advanced or require submission of that specific question to the jury. *Ibid.*

3. Where by its terms a guaranty is continuing in its nature and covers all sums to be advanced by a bank to a certain person and all notes given for sums so advanced, up to a certain amount, the guarantor is not discharged by renewal, without his knowledge, of notes so given and extension of the time of payment thereof. *Ibid.*

GUARDS for dangerous machinery. See MASTER AND SERVANT, 17-33.

HEALTH. See FOOD.

HIGH SCHOOLS. See SCHOOLS AND SCHOOL DISTRICTS.

HIGHWAYS. See TELEGRAPHS AND TELEPHONES.

HOMESTEAD.

What occupancy gives right. See MORTGAGES, 15. TRESPASS, 4-6.

Mere occupation of premises with permission of the life tenant by one having only a remainder or reversion after the termination of the life estate, does not entitle the occupant to claim the premises as his homestead, exempt from execution under sec. 2983, Stats. (Supp. 1906: Laws of 1901, ch. 269, sec. 1). Although by said statute the exemption extends "to any estate less than a fee held by any person by lease, contract or otherwise," there must be a present right of occupancy by title in the person claiming the homestead. *Reeves & Co. v. Saxton*, 10

HOMESTEADER. See TRESPASS, 4-6.

HUSBAND AND WIFE. See WITNESSES, 6, 7.

IMPRISONMENT. See RAPE, 6.

INCOMPETENT PERSONS. See WITNESSES, 9, 10.

INDETERMINATE PERMIT. See RAILROADS, 2, 5-11.

INDORSEMENT. See BILLS AND NOTES, 2, 3, 6.

INJUNCTION.

Grounds. See MUNICIPAL CORPORATIONS, 33, 37. WATERS AND WATERCOURSES, 2.

Permanent injunction: Conditions.

Where after trial on the merits a circuit court decides that a plaintiff is entitled to a permanent injunction as prayed, it is error to make the granting of such relief conditional upon the

filing of an undertaking that if on appeal judgment shall be awarded to defendant plaintiff will pay such damages as defendant shall have sustained by reason of the injunction. Such a requirement violates sec. 9, art. I, Const. *Manitowoc v. Manitowoc & Northern T. Co.* 13

INSANE PERSONS. See WITNESSES, 10.

INSOLVENCY. See ASSIGNMENT FOR BENEFIT OF CREDITORS. BANKRUPTCY.

INSTRUCTIONS TO JURY.

General rules.

1. The court may properly mention to the jury the evidence bearing on any controversy, speaking of it correctly, and, in case of conflict, without suggesting the effect thereof. *Holway v. Sanborn,* 151

2. A court may in a criminal case, as in any other, instruct the jury respecting facts established by the evidence beyond any room for reasonable controversy, and when such evidentiary facts exist establishing beyond any room for reasonable controversy an essential of any ultimate conclusion sought, it is not a harmful error, if error at all, to treat such essential as having been proven. *Burns v. State,* 373

Requests for instructions.

3. Trial courts are not required to adopt any particular phrasing of a rule of law given to the jury, and the mere refusal to give a requested instruction which correctly states the law is not error if it is in fact embodied in substance in the general charge. *Herlitzke v. La Crosse Inter-Urban Telephone Co.* 185

4. Refusal of the trial court to give requested instructions is not error when the general charge was full and complete and as favorable to the party making such request as the law permitted. *Hippler v. Quandt,* 221

Bailment. See BAILMENT, 2.

Burden of proof.

5. An instruction as to a material question to the effect that, whether they answered it yes or no, the jury should be satisfied to a reasonable certainty by the preponderance of the evidence that the fact was as expressed in such answer, was erroneous as against the party upon whom the burden of proof did not properly rest. *Carle v. Nelson,* 593

6. The party upon whom such an instruction casts a greater burden than the law requires may justly complain thereof if the jury's answer is unfavorable to him. *Ibid.*

7. The error in such a case must be deemed to have affected substantial rights of the party so complaining, within the meaning of sec. 3072*m*, Stats. (Laws of 1909, ch. 192), if there was any evidence in the case to support a finding in his favor, since the court cannot say but that the jury might have so found under correct instructions. *Ibid.*

8. Such an error is not cured by another and correct instruction as to the burden of proof. *Ibid.*

Condemnation of lands: Damages.

9. An instruction to the jury in a condemnation suit, stated in the opinion, was not improper as permitting the jury to duplicate damages. *Jeffery v. C. & M. E. R. Co.* 138 Wis. 1, distinguished. *Jeffery v. Osborne,* 351

Contributory negligence. See MASTER AND SERVANT, 41.

Conversion. See BAILMENT.

Rape. See RAPE, 4.

INSURANCE.

1. No false representation by an applicant for accident insurance in stating that he was by occupation a miller is shown by evidence that he was at the time operating a flour mill and that *at or about or after* that time he got a sawmill attachment and personally operated it. *Denoyer v. First Nat. Acc. Co.* 450
2. Where an accident policy recognizes the right of the assured to change his occupation and liability of the insurer to compensate him in some amount for injury sustained in a more hazardous occupation, the assured may recover for injury sustained in an entirely prohibited occupation, where he had no notice, actual or constructive, of such prohibition; and the amount recoverable is that stipulated in the policy, if no agreement or stipulation for a less sum is shown. *Ibid.*
3. A manual of instructions gotten up for the guidance of the agents of an unincorporated insurer, but not brought to the attention of the assured, is not competent evidence as against the assured to change the construction which his written policy would otherwise bear. *Ibid.*

INTEREST.

Plaintiffs' oral agreement that if defendant would continue to buy goods of them no interest would be charged on his account was waived by defendant's subsequent conduct during four years in receiving and acquiescing in statements of account in which interest was charged, and in making payments on account without protest after knowledge that his remittances were being credited on the amount of principal and interest and the balance carried forward as an item into the next statement. *Miller v. Ryder,* 526

INTERSTATE COMMERCE. See CHATTEL MORTGAGES, 3. CORPORATIONS, 1, 2. GARNISHMENT.

INTERURBAN RAILWAYS. See CARRIERS, 6. RAILROADS, 12–14.

INTOXICATING LIQUORS.

1. A "school," within the meaning of subd. 5, sec. 1548, Stats. (Supp. 1906: Laws of 1905, ch. 385), is not measured by the walls of a building. One school may occupy two or more buildings, or two or more schools may occupy one building. *State ex rel. Dick v. Kalaher,* 243
2. Where two school buildings were located on the same grounds and in one of them, a high school building, there were high school pupils and grade school pupils and in the other there

were grade school pupils, the high school building and the pupils enrolled therein did not constitute a "school" within the meaning of said statute. *Ibid.*

[3. Whether in such case there was more than one school upon the grounds, not determined.]

JOINDER OF CAUSES OF ACTION. See BOUNDARIES, 3-6.

JUDGMENT.

By confession.

1. The power to confess judgment by warrant of attorney comes from the common law and is governed thereby except as that has been modified by statute and the decisions of the courts of last resort in this country. *Halfhill v. Malick,* 200

2. The strict rule of the common law that a judgment could not be confessed on a warrant of attorney after a year and a day, unless an affidavit was filed showing that the maker was alive and that some portion of the debt was still due, does not apply where the power is coupled with an interest and supported by consideration, and necessary to effectuate the security to which it attaches. *Ibid.*

3. The rule does not go to the question of power, but to the regularity of execution of the power. It is a rule of presumption which, like other presumptions, may be rebutted, and the record of the judgment is ample to rebut the presumption of payment, if any there be, arising from the lapse of time. *Ibid.*

4. In the absence of equities in favor of the debtor, a judgment by confession on warrant of attorney will not be set aside for mere irregularities. *Ibid.*

5. Mere irregularities under a warrant of attorney with release of errors will not generally subject a judgment to collateral attack. *Ibid.*

6. Under the statute of Ohio a complaint or petition founded upon a promissory note may be verified by plaintiff's attorney where such instrument is in the hands of the attorney, and judgment thereon, entered on warrant of attorney, will be valid. *Ibid.*

7. The provisions of sec. 2896, Stats. (1898), that the warrant of attorney under which judgment is confessed shall be made a part of the judgment roll, and that the affidavit therein required shall be attached to the complaint, do not apply to a judgment confessed in Ohio where the statute does not call for an affidavit and only requires that the original or a copy of the warrant shall be filed with the clerk. *Ibid.*

8. A power of attorney to confess judgment on a promissory note in favor of the payee or assigns, authorizes confession of judgment in favor of an indorsee. *Ibid.*

9. The question whether a person in whose favor a judgment has been confessed on a warrant of attorney is the real party in interest cannot be raised on collateral attack on the judgment. *Ibid.*

10. A nonresident defendant who appears by attorney and confesses judgment under a warrant of attorney is "found" in the county where such judgment is entered, within the meaning of a statute (of Ohio) which provides that actions may be brought in the county where the defendant is found. *Ibid.*

Opening or vacating. See JUDGMENT, 4.

11. It was not an abuse of discretion to vacate a judgment on cognovit upon notes secured by chattel mortgage and permit the defendant to interpose a defense to the effect that the debt had been extinguished by voluntary acts of plaintiffs in failing to comply with sec. 2316c, Stats. (Laws of 1903, ch. 122), especially where defendant was merely a surety. Permission to interpose that defense should not be refused in such a case on the ground that the rights conferred by the statute operate inequitably. *Schoenmann v. Hood,* 241

Collateral attack. See JUDGMENT, 5, 9.

Foreign judgments. See DIVORCE, 4. JUDGMENT, 6, 7, 10.

12. The fact that a foreign judgment was for seventy-four cents too much is immaterial in an action thereon, under the maxim *de minimis non curat lex. Halfhill v. Malick,* 200

13. A foreign judgment which, under the law of the state where it was rendered, is admissible in evidence and valid without being signed by the judge or clerk of the court, is entitled to full credit here, although unsigned. *Ibid.*

14. The record of the judgment of a court of another state is admissible in evidence here if attested and certified either in accordance with the federal statute or with the statute of this state. *In re Box's Will,* 127 Wis. 264, so far as it conflicts herewith, overruled. *Ibid.*

JURISDICTION. See APPEAL, 1. MUNICIPAL CORPORATIONS, 20. NE EXEAT, 1. PARTNERSHIP, 5.

JURY.

Right to trial by jury. See CONSTITUTIONAL LAW, 3, 4. DAMAGES, 10.

Competency of jurors.

1. A juror in a criminal case is not necessarily incompetent merely because he has an impression or opinion as to the merits of the case, formed from reading newspaper accounts and from other hearsay information. *Burns v. State,* 373

2. On a challenge in such case the question of competency is one of fact to be determined by the trial court in view of all the evidence and the mental characteristics of the juror appearing from his examination. *Ibid.*

3. A decision of the trial court holding such a juror competent will not be held erroneous unless clearly shown to be wrong or an abuse of discretion: but, generally speaking, the practice is to be commended which excuses the juror in such a case. *Ibid.*

Misconduct.

4. Misconduct of the jury, after the panel had retired, in getting possession of a newspaper and reading therein an account of their deliberations, and misconduct of the officer in charge in permitting the jury to get possession of such paper, do not call for a reversal of the judgment unless it appears to this court that, had the improper conduct not occurred, the result might, within reasonable probabilities, have been different. *Burns v. State,* 373

5. Such misconduct, as well as the misconduct of the newspapers in publishing the secrets of the jury room, are highly reprehensible and should be rebuked or punished by trial courts. *Ibid.*

JUSTIFICATION. See SHERIFFS, 2.

LANDLORD AND TENANT. See MINES AND MINERALS.

LARCENY. See BAILMENT, 2, 3.

LAW OF THE CASE. See APPEAL, 16–18.

LEADING QUESTIONS. See RAPE, 1.

LEASES. See MINES AND MINERALS.

LEGISLATIVE POWERS. See CARRIERS, 5. CONSTITUTIONAL LAW, 1, 2. RAILROADS, 3, 14.

LIBEL AND SLANDER. See PROHIBITION.

LICENSES. See MUNICIPAL CORPORATIONS, 5–14, 35, 36.

LIMITATION OF ACTIONS.

Operation and effect of bar. See EVIDENCE, 5. PAYMENT, 3–7.

Same: Notice of injury.

1. Findings by the jury upon sufficient evidence, stated in the opinion, constitute a sufficient basis for holding the master estopped from insisting that such failure to give notice barred the action under subd. 5, sec. 4222, Stats. (1898), if an estoppel *in pais* can have such effect. *Guile v. La Crosse Gas & Electric Co.* 157

2. The provision of subd. 5, sec. 4222, Stats. (1898), that no action to recover damages for an injury to the person shall be maintained unless the notice therein prescribed shall be served within a year, although a statute of limitation, differs in its nature and purpose from ordinary limitation statutes and demands the application of different rules of law. All of its requirements being such that the person subject to be charged may willingly forego them, and may therefore readily induce the injured person to believe that he will forego them, if a failure to give the notice has been reasonably induced by the defendant he may be held to be estopped from insisting upon such default as a bar to the action. *Ibid.*

3. The limitation prescribed in subd. 5, sec. 4222, Stats. (1898),—requiring notice to be served within one year as a condition precedent to maintenance of an action for injury to the person,—is applicable to an action in tort for malpractice by a surgeon. [Whether it applies when such an action is based on contract, not determined.] *Frechette v. Ravn,* 589

Pleading. See PLEADING, 4.

LOGS AND TIMBER. See PLEADING, 1. REPLEVIN. TRESPASS.

MACHINERY. See MASTER AND SERVANT, 14–33.

MALICIOUS PROSECUTION.

In an action for malicious prosecution the evidence is *held* to sustain a verdict to the effect that defendant did not make a full, fair, and impartial statement to the district attorney of all the facts within his knowledge relative to the offense charged, and

act honestly and in good faith upon the advice of such attorney. *Hippler v. Quandt,* 221

MALPRACTICE. See LIMITATION OF ACTIONS, 3. PLEADING, 4.

MANDAMUS. See ELECTIONS, 1, 6. NE EXEAT, 2.

MANDATORY STATUTES. See MUNICIPAL CORPORATIONS, 20.

MARKET VALUE. See DAMAGES, 1, 2, 6–9. TRIAL, 12.

MARRIED WOMEN. See ESTOPPEL, 1, 3.

MASTER AND SERVANT.

The relation: Scope of employment. See RAILROADS, 16–20.

Same: Termination and discharge.

1. As long as he is permitted to perform the services he contracted for, a servant cannot treat a mere request or direction to perform additional services as a discharge; but he may so treat a refusal to permit him to perform the substantial or principal service he agreed to perform and a direction to substitute a different service. *Loos v. Geo. Walter Brewing Co.* 1

2. An employee of a brewing company having been sent to assist in the purchase of a saloon by a prospective customer of the company to whom the company was to loan the money to carry out the deal, the question whether, in accepting a commission from the vendor, such employee was guilty of such a breach of duty as to warrant his discharge is *held,* upon the evidence, to have been one for the jury, it being doubtful whether any wrong was intended or any real injury inflicted upon the employer's business. *Ibid.*

3. If misconduct amounting to breach of the contract of employment existed at the time of a discharge, the employer can justify under it even though he did not know of it at the time. *Ibid.*

Master's liability for injuries to servant: Line of duty.

4. An employee in a sawmill, hired primarily to clean up around a resawing machine and assist in taking away material from it, having been directed by the foreman in charge of the mill to do the work of feeding the machine when the regular feeder wished him to and needed him, was engaged in the line of his duty when injured while obeying such direction. *Schweikert v. John R. Davis Lumber Co.* 632

Same: Places for work. See MASTER AND SERVANT, 43, 44. RAILROADS, 15.

5. The fact that the plank wall of a coal shed which had been built by defendant about a month before suddenly gave way and the top of the wall moved several feet and injured a servant who was engaged in bracing it, was sufficient, in the absence of any explanation, to warrant a finding by the jury that the wall was not properly constructed, to the knowledge of the defendant. *Schmidt v. J. G. Johnson Co.* 49

6. The mere fact that the servant, by direction of the defendant, was engaged in bracing the wall of the shed, which at the time was only half filled with coal, would not justify the court in holding as a matter of law that he was knowingly making a dangerous place safe and hence that he assumed the risk and that the rule requiring the master to furnish a reasonably safe working place

did not apply. Many reasons beside the avoidance of present danger might exist for bracing the wall; and in the absence of anything appearing to the contrary the servant had the right to believe it safe. *Ibid.*

7. Such a case does not fall within the principle that where work is of such a nature that its progress is constantly changing the conditions as regards increase or diminution of safety, the safe-place rule does not apply. *Ibid.*

8. Where the servant in such case was not chargeable with notice of the dangerous condition of the wall, the fact that, in chopping off a knot from one of the bin posts for the purpose of fitting the brace thereto, he had placed himself on a ladder in the space between the wall and an independent post standing near,—that being the most convenient place for doing the work,—does not show that he was guilty of contributory negligence, although when the wall gave way he was crushed between it and said independent post. *Ibid.*

9. The master should furnish his servants with a reasonably safe place to work; reasonably safe instrumentalities with which to do the work; and fellow-servants provided should be reasonably safe as such,—the standard of care as to each duty being such as is exercised by the great mass of mankind under the same or similar circumstances. *Knudsen v. La Crosse Stone Co.* 394

10. The presumption of fact is in favor of the master having performed the duties mentioned till overcome by evidence establishing the contrary to a reasonable certainty. *Ibid.*

11. The safe-place rule having been satisfied at the start, and the conditions being such that thereafter the servants necessarily are expected to make their own working places, which must, necessarily, change from time to time and at short intervals as the work proceeds, dangers created are not attributable to the master. *Ibid.*

12. In the circumstances last mentioned, negligence of one or more of several servants, not excepting the foreman of the crew, rendering the working place of some other servant, or servants, unsafe is negligence of a fellow-servant. *Ibid.*

13. In operations where the servants necessarily make their own working place, the safe-place-to-work rule has little or no application. *Ibid.*

Same: Defective machinery and appliances.

14. In an action for injuries to a servant, caused by a dowel pointer flying from the machine at which he was working, the evidence is *held* to show that the tool did not fly from the machine because of any improper construction or want of repair thereof; that plaintiff's claim that the nut which secured the tool, after being screwed on tight, came off during the operation of the machine, was not supported by the evidence and was contrary to physical laws; and that, even if it were conceded that the nut did come off, it was a pure accident, for which defendant was not responsible. *Portman v. Cappon,* 126

15. In an action against a gas company for personal injuries to an employee caused by an explosion of air mixed with gas which had escaped in the purifying house, a finding by the jury that

the gas was ignited and exploded by a spark from the electric lamp inside said house is *held* to be sustained by the evidence, although officers of the defendant testified that the electric current had been turned off from said house previous to the accident, and there was other testimony tending to show that plaintiff entered the house with a lighted torch. *Guile v. La Crosse Gas & Electric Co.* 157

16. It appearing by the evidence that "blowouts" frequently occurred in the purifying room resulting in an escape of gas which, being mixed with the air, created a highly explosive mixture readily ignited by a spark, and that the electric lamp in use was likely to emit a spark when the current was broken, it was a question for the jury whether such electric lamp was, under the circumstances, a reasonably safe appliance for that place. *Ibid.*

Same: Fencing and guarding machinery.

17. The duty to fence or guard dangerous machinery does not extend to parts thereof so located that in order to reach the region of danger a person must depart from any way which he could reasonably be expected to take. *Kroger v. Cumberland Fruit Package Co.* 433

18. Sec. 1636*j*, Stats. (1898), did not create a rule of absolute liability. It does not displace the common-law standard of care of the master or that of the servant; sec. 1636*jj*, Stats. (Supp. 1906: Laws of 1905, ch. 303), was enacted in view of sec. 1636*j* not increasing the care of the master in any of the particular cases beyond the standard of the great mass of mankind under the same or similar circumstances, nor abolishing the defense of contributory negligence, strictly so called, or the special form thereof denominated assumption of the risk. *Willette v. Rhinelander Paper Co.* 537

19. In sec. 1636*jj* the legislature recognized the aforesaid meaning of sec. 1636*j* by characterizing failure to comply therewith as "negligent omission," etc., and recognized its adjudicated purpose as to contributory fault and assumption of the risk, by abolishing competency to establish the matter by a single named circumstance. *Ibid.*

20. In respect to sec. 1636*j*, except in situations obviously dangerous, if an employer furnishes such a guard or fence as is in general use among employers of ordinary care under the same or similar circumstances, he has discharged his duty,—the dangerous machinery is securely guarded or fenced within the meaning of the statute,—in that, when all ordinary care to that end shall have been exercised by the master his statutory duty has been performed. *Ibid.*

21. The statute leaves, primarily, the master to determine whether a situation needs guarding or fencing in contemplation thereof, and if so, the means and manner of complying therewith, subject to the duty, which is absolute, to exercise all ordinary care in respect to the matter. *Ibid.*

22. When a statute commands the doing of some act by one person for the personal safety of another, without prescribing any penalty for the benefit of the latter in case of his being injured by breach of such command, such breach is negligence *per se*, as matter of fact, of the grade of want of ordinary care with inci-

dental liability, but rebuttable by proof to the contrary, the same as in ordinary cases of negligent injury, in the absence of express language to the contrary. *Ibid.*

23. The language of sec. 1636*jj* abolishing contributory conduct of a claimant for compensation for an injury within the statute, extends only so far as otherwise acceptance of the danger would be provable by knowingly submitting thereto. *Ibid.*

24. Failure to comply with sec. 1636*j* of the statutes in any situation, is not excusable because it is not practicable to so guard or fence as to render such situation reasonably safe for employees to discharge their duty in the exercise of ordinary care. *Ibid.*

25. The effect of the statute is to prohibit the use of such machinery as is mentioned therein, unless by the exercise of ordinary care it can be rendered reasonably safe for employees in the discharge of their duty in the exercise of like care. *Ibid.*

26. It appearing conclusively from the evidence—that an employee received a personal injury by coming in contact with machinery in the discharge of his duty, and the jury having found that such machinery was so located that the employer in the exercise of ordinary care ought reasonably to have apprehended some employee in the exercise of like care might be injured thereby, and that he failed to guard or fence the machinery in respect to such danger, and that the employee was not guilty of any want of ordinary care in respect to the matter—the employer is liable as matter of law. *Ibid.*

27. In the circumstances stated in the foregoing a finding negativing that failure to comply with the statute was the proximate cause of the injury is inconsistent with the other findings and on motion should be changed. *Ibid.*

28. In such circumstances a finding on the subject of proximate cause is nonessential since such element is shown as matter of law from the other facts. *Ibid.*

29. In like circumstances if the negative answer is predicated merely on impracticability to guard or fence without the aid of some implement which was not furnished, then it is equivalent to an affirmative finding. *Ibid.*

30. Upon the question of the practicability of guarding a sprocket wheel attached to the front end of a resawing machine, a factory inspector who had had much experience in examining similar machinery for the purpose of determining its safety, had seen such machinery guarded in factories, and had ordered it guarded in other factories, was fully qualified to testify as an expert. *Schweikert v. John R. Davis Lumber Co.* 632

31. A sprocket wheel and chain used in transmitting power from a shaft to a roller in a resawing machine is within the statute (sec. 1636*j*, Stats. 1898) requiring "all belting, shafting and gearing" so located as to be dangerous, etc., to be securely guarded or fenced. *Ibid.*

32. Proof that such sprocket wheel was located just at one side and near the front of the machine and right above the table on which slabs were fed, and was in close proximity to the place where the feeder worked, was sufficient to sustain a finding by the jury that it was so located as to be dangerous to employees in the discharge of their duties. *Ibid.*

33. Where the law requires some particular thing to be done by a person to secure the personal safety of others, a failure to perform such duty constitutes actionable negligence at the suit of a person of the class designated who is injured by such failure, without contributory negligence on his part. *Ibid.*

Same: Warning and instructing servant.

34. The questions whether the servant had been warned of the danger before a wall gave way, and whether his injury was the result of an unaccountable accident or of the defective construction of the wall, are *held* upon the evidence to have been for the jury. *Schmidt v. J. G. Johnson Co.* 49

35. Where in a factory a temporary and not very obvious change is made whereby a poisonous liquid flows from a hose in place of water, a reasonably explicit notice of the change should be given to employees who have been accustomed to drink the water from such hose. *Fidelity Trust Co. v. Wisconsin I. & W. Works,* 385

36. The ordinary warning or instruction which it is the duty of a master to give to his employee concerning latent dangers in the work is not sufficient in such case. *Ibid.*

37. In an action for death of an employee caused by drinking the poisonous liquid, where the negligence charged against the employer was failure to give notice of the change, the question whether the decedent was negligent in failing to investigate before drinking was sufficiently covered in the special verdict by a question relating to contributory negligence, and no separate question concerning assumption of risk was necessary. *Ibid.*

38. In an action for injuries to a young man, seventeen years of age, while driving one of three teams attached to a loaded log sled which was being pulled down a steep descent, it is *held*, upon the evidence, that the danger was not so obvious nor plaintiff's experience so sufficient as to warrant the court in saying as matter of law that he should have known the danger or that warning was unnecessary; and that the questions of negligence and contributory negligence were therefore for the jury. *Schmolt v. H. W. Wright Lumber Co.* 577

39. In such case the fact of plaintiff's knowledge or lack of knowledge of the danger, and the fact whether he ought to have known of the same, were relevant as bearing both upon the question of defendant's negligence in failing to give warning and upon plaintiff's assumption of the risk and contributory negligence; and so far as they went to establish the former the burden of proof was on the plaintiff, but so far as they constituted essentials of the defenses named the burden was on the defendant. *Ibid.*

40. The trial court having submitted these elements in an appropriate question, not directly or specifically, but as items of fact going to prove or disprove want of ordinary care on the part of defendant's foreman in failing to warn the plaintiff,—incorporating them into the question by the charge to the jury and instructing that the burden of proving such want of ordinary care was on the plaintiff,—it was not error to refuse to submit the specific question whether a person of plaintiff's age and experience ought to have known that the tongue was liable to swing with enough force to throw the horse or neck-yoke against him. *Ibid.*

41. Nor was it error in such case to submit separately the question of contributory negligence by the questions, "Did plaintiff know that in going down the hill the near pole horse was liable to be thrown to the side by the swinging of the tongue of the sleigh?" and "Ought the plaintiff, in the exercise of ordinary care, to have comprehended the danger of being thrown down by reason of the pole horse being thrown to the side by the swing of the tongue of the sleigh?" and to charge that, upon the issue so submitted separately from the question of defendant's negligence, the burden of proof was upon the defendant. *Ibid.*

42. Under the facts as stated the duty, if any, to give warning was a duty of the master, which he must exercise himself or through a vice-principal,—in this case the foreman,—and if plaintiff's injury resulted proximately from neglect of this duty, concurring negligence of the foreman as a fellow-servant in some other duty would not change the result. *Ibid.*

Same: Vice-principal. See MASTER AND SERVANT, 42.

Same: Foreman. See MASTER AND SERVANT, 4, 12, 42–44.

Same: Fellow-servants. See MASTER AND SERVANT, 9, 12, 42.

43. The foreman of a crew erecting a water tank, or removing heavy machinery from a car to a factory, or moving a pile-driver, or in charge of a train crew, or the crew of a vessel, or a dock crew in regard to all the details of the general employment as regards the safe-place rule, is a fellow-servant of the men under him. *Knudsen v. La Crosse Stone Co.* 394

44. A blaster working with others under a foreman, all constituting a stone quarry crew, is a fellow-servant of such foreman in respect to duties of the latter as to guarding against the working place of those under him being made unsafe by the rolling down from one level to another of earth or rock in the course of quarry work. *Ibid.*

Risks assumed by servant. See MASTER AND SERVANT, 6, 7, 11, 18, 19, 37.

Same: Contributory negligence. See MASTER AND SERVANT, 8, 18, 19, 23, 37–39, 41. RAILROADS, 22, 23.

45. In an action for personal injury to a servant, his positive testimony that he did not know there was danger in the place in which he put his hand does not necessarily make the question of his contributory negligence one for the jury, where the circumstances so clearly overcome such testimony as to render it not in reason believable. *Kroger v. Cumberland Fruit Package Co.* 433

46. In an action for injury to the hand of an employee operating a planing machine, it is *held*, upon the evidence, that there was no error in directing a verdict for defendant either on the ground that no actionable negligence was shown or on the ground that plaintiff was conclusively shown to have been guilty of contributory negligence, although he testified that he did not know that knives were revolving in the region where he placed his hand. *Ibid.*

47. In an action for injury to a young man, eighteen years of age, whose hand was caught by a sprocket wheel on a resawing machine which he was feeding in a sawmill, the evidence is *held* to sustain a finding by the jury that he was not guilty of contributory negligence. *Schweikert v. John R. Davis Lumber Co.* 632

Same: Notice of injury. See LIMITATION OF ACTIONS, 1, 2.

Liability for acts and omissions of servant. See MASTER AND SERVANT, 43, 44. RAILROADS, 16–23.

MAXIMS.
De minimis non curat lex, 201, 212.
Expressio unius est exclusio alterius, 464.
Qui prior est tempore, potior est jure, 652.
Quod ad statum reipublicæ pertinet, 318.
Ubi cessat remedium ordinarium ibi decurritur ad extraordinarium, 321.
Ubi jus incertum, ibi nullum, 174.
Ubi lex est specialis, et ratio ejus generalis, generalitur accipienda est, 176.

MEASURE OF DAMAGES. See APPEAL, 17, 18. DAMAGES, 1–9. EASEMENTS. EMINENT DOMAIN. INSTRUCTIONS TO JURY, 9. TRIAL, 1, 12.

MIDDLEMAN. See BROKERS.

MILL-DAMS. See EVIDENCE, 7. NUISANCES, 2. WATERS AND WATERCOURSES.

MINES AND MINERALS.

Leases.

1. Mining leases form a distinct class of instruments, creating special and peculiar legal relations and legal rights. *Loveland v. Longhenry,* 60
2. Where a mining lease, granted in consideration of the rents, covenants, and conditions therein agreed to be paid, kept, and performed by the lessee, fixes no time for its expiration and no day for the payment of rents and contains no express provisions for forfeiture, but requires the lessee to prospect the leased lands, to work, develop, and operate any mine or mines discovered thereon, and to pay as rent one tenth part of the value of all ores and minerals discovered and mined, the covenant to prospect the land will be held to be a condition, upon breach of which the lessor may declare the lease at an end and enter upon and repossess himself of the land. *Ibid.*
3. Such covenant and condition requires diligent and fairly continuous prospecting and search for a mine, so that the landowner will receive something for his land. *Ibid.*
4. Where the lessee under such a lease, without having discovered a mine, discontinued prospecting operations on September 1, 1907, and had carried on no further work thereon up to November 13, 1908, this was a sufficient breach of the condition to authorize the lessor to terminate the lease by notice and entry. *Ibid.*
5. Such delay and suspension of operations was for an unreasonable time; and it is not sufficient excuse therefor that the lessee was without means to carry on the prospecting work. *Ibid.*
6. After forfeiture for breach of condition is complete, the lessor may, without waiving such forfeiture or breach, offer to allow the lessee to retain part of the leased premises on condition that he will acquiesce in the forfeiture as to the remainder. *Ibid.*
7. Where, in an attempt to settle a controversy with respect to title between a tenant in possession and a lessor, a new lease is executed, and such new lease covers only part of the lands in controversy, and the parties cannot agree as to what was intended

to be covered thereby, but both stand upon their rights at law, without seeking reformation, and both claim rights under the new lease as to the lands actually covered thereby, the lands not covered by the new lease must stand upon the former title, lease, or license, which will not be deemed to have been displaced by the execution of such new lease as to any tract not included therein. *Ibid.*

MORTGAGES.

Requisites and validity. See CORPORATIONS, 4. WILLS, 3.

Same: Securing several notes: Priority: Fiduciary relations.

1. Where a fiduciary acts, in the same transaction, both for himself and for those whom he represents, either as vendor and vendee, obligor and obligee, or releasor and releasee, his acts are voidable at the election of the persons whom he undertakes so to represent, and neither good faith nor fair purpose on his part, nor valuable consideration paid out by him, will avail to support the transaction against such election. *Shaw v. Crandon State Bank,* 639
2. But where the fiduciary deals in good faith with those whom he represents in that capacity, each acting for himself, and parts with a valuable and sufficient consideration, the transaction may sometimes be upheld notwithstanding the fiduciary relation. *Ibid.*
3. A finding by the trial court that a fiduciary acted in good faith and was guilty of no actual fraud, is a finding of fact; but a finding, upon undisputed facts, that he was guilty of no constructive fraud, is a mere conclusion of law. *Ibid.*
4. So, also, a finding upon undisputed facts that transactions by a fiduciary were ratified by those whom he represented, is a conclusion of law. *Ibid.*
5. The president, vice-president, and cashier of a bank, being three of its four directors, were also members of a board of six directors of a manufacturing company, and the vice-president and assistant cashier of the bank were members of the finance committee of said company. The company owed the bank sums aggregating more than half the capital of the bank, partly secured on two tracts of land owned by the company by deeds to the bank and by a trusteeship in which the vice-president of the bank was trustee. Said vice-president individually loaned to the company a large sum of money, and with the other directors of the bank consented that the bank release to the company its existing securities, and that the company execute a mortgage by which said vice-president and also the president of the bank should have liens prior to that of the bank on all the property of the company, including that so released. *Held.* that the transaction so far as it concerned the released property is voidable at the election of the bank and cannot be upheld by proof of good faith or the payment of a valuable consideration by said vice-president to the company; but as to the other property, upon which the bank had no lien, the priority given by the mortgage in favor of the vice-president advancing the cash may be upheld upon proof of the good faith and honest purpose of the transaction. *Ibid.*
6. The directors of the bank who were interested in the manufacturing company were not competent to ratify the transaction

on behalf of the bank so far as the bank thereby released its prior securities and subordinated its lien under the mortgage to the liens of the other mortgagees. *Ibid.*

7. No ratification of such priority of the liens of the other mortgagees over that of the bank can be inferred from a pleading on behalf of the bank seeking foreclosure of the mortgage but denying such priority. *Ibid.*

8. Nor can ratification be predicated upon the fact that the money loaned to the manufacturing company by the vice-president of the bank was deposited in the company's checking account at the bank. *Ibid.*

9. Where the respective holders of several notes secured by a single mortgage running to them jointly do not stand equal in equity with reference to the manner of acquisition of security or with reference to one another, the rule of *Wood v. Trask*, 7 Wis. 566, and other cases following that case, does not confer priority of lien upon the holder of the note first falling due. *Ibid.*

10. Thus, in the case above stated, a claim of the president of the bank to priority of lien, on the ground that his note fell due before that of the bank, cannot be upheld where he advanced no money but merely guaranteed the payment of certain debts of the manufacturing company. *Ibid.*

11. But, as between said president and the vice-president who advanced money to the company, their equities being otherwise equal, and the note of the vice-president by agreement falling due first, the latter may have priority under the rule above referred to. *Ibid.*

12. Where one mortgage runs to the payees in three several notes secured thereby, and one of said payees advanced cash for his note, the second undertook to pay certain other notes of the mortgagor for his note, and the third secured a pre-existing indebtedness of the mortgagor by its note, and the mortgagor, by agreement to which the third payee was not a party, consented that the second might, instead of paying said other notes, guarantee payment thereof, and, acting thereon, the second payee did not pay said other notes, it was error to provide in the decree of foreclosure that the sheriff should deposit part of the proceeds of the sale with the clerk of the court, there to remain until said second payee should deposit with the clerk the notes of the mortgagor guaranteed by him, since this might tie up the proceeds of sale for an indefinite time. *Ibid.*

13. Properly, under the circumstances stated, the second payee should be given a short time within which to pay and discharge said other notes of the mortgagor, and should have his proportion of the proceeds of sale only in case he did discharge said notes within such time. *Ibid.*

14. The claim to priority of lien by a plaintiff in foreclosure may be contested on equitable grounds by a mortgagee whose debt is not due, as well as by one whose debt is due. *Ibid.*

Reformation.

15. The description in a mortgage cannot be corrected, in an action to reform the instrument, so as to include the homestead of the mortgagors, who were husband and wife at the time of its execution. Sec. 2257, Stats. (1898), does not relate to an action for reformation, and the amendment of sec. 2203 by ch. 45, Laws

of 1905, did not alter the rule. *Gotfredson Brothers Co. v. Dusing,* 659

Foreclosure. See BILLS AND NOTES, 4, 5. CHATTEL MORTGAGES. CORPORATIONS, 2. MORTGAGES, 12–14.

Redemption. See PARTIES.

MUNICIPAL CORPORATIONS.

General city charter. See CONSTITUTIONAL LAW, 2. MUNICIPAL CORPORATIONS, 24–27.

Governmental powers and functions: Implied powers.

1. Municipal corporations may exercise only such powers as are clearly embraced within the legislative grant or those derived therefrom by necessary implication. *Flannagan v. Buxton,* 81
2. Under sec. 893, Stats. (1898), there is no implied authority, unless under special and extraordinary circumstances, to employ private detectives to investigate and report upon violations of law in the village. *Ibid.*

Ordinances: Franchises. See CARRIERS. MUNICIPAL CORPORATIONS, 26, 29. RAILROADS, 2–14.

3. A municipal ordinance empowering a corporation "to lay down in the ground, put on poles and otherwise attach wires or other suitable conductors for the transmission of electricity, upon, over, through, under and in the streets, lanes, alleys and public grounds" of the city, includes power to transmit electric current, using the public way as indicated, for all lawful purposes. *State ex rel. Kenosha G. & E. Co. v. Kenosha E. R. Co.* 337
4. A public franchise, burdened with a public revenue feature, is not grantable by a state agency in the absence of express or unmistakable legislative authority to impose such a burden. *La Crosse v. La Crosse Gas & Electric Co.* 408
5. Mere authority to a municipality, as in sec. 1780*b*, Stats. (1898), for the holder of a state franchise to exercise it within the corporate limits of a city by consent of and in the manner agreed upon therewith, does not include power to such city to exact, as a condition of such exercise, payment of an excise tax in addition to all other taxes. *Ibid.*
6. Sec. 1780*b* expresses no more than that the municipality may impose reasonable burdens. *Ibid.*
7. Municipalities do not possess power to license occupations and exact compensation for the purpose of obtaining public revenue, in the absence of unmistakable granted authority to that effect. *Ibid.*
8. The mere power to exclude a corporation from exercising a franchise in a municipality, does not include power to allow such exercise on condition of submitting to a special taxation burden. *Ibid.*
9. Laws should be strictly construed to avoid reading therefrom a special tax burden feature. *Ibid.*
10. A law authorizing a municipality to grant to a corporation the privilege to exercise its public utility franchise therein "upon such terms and subject to such rules and regulations and the payment of such license fees as the common council may prescribe" authorizes such use to be conditioned upon prescribed rates for service. *Ibid.*

11. Such feature as that mentioned engrafted upon a corporate railway franchise by the state, or an authorized state agency, inheres therein and is subject to the reserved power to alter or amend. *Ibid.*

12. Power to a municipal or *quasi*-public corporation to make contracts affecting public interests, acting in the mere business capacity to deal with proprietary matters, is not to be inferred by doubtful construction. *Ibid.*

13. The condition of a corporate public utility franchise which inheres in the privilege as distinguished from mere contracts which the corporation may make, is subject to the provisions of the public utility law that all charges shall be just and reasonable. *Ibid.*

14. A corporate franchise is one thing, a mere privilege not corporate, which may be granted without condition and become mere property—be sold and pass from one to another as other property may—is a far different thing. *Ibid.*

Officers, agents, and employees. See MUNICIPAL CORPORATIONS, 23.

Same: Pensions.

15. Under sec. 959—46*n*, Stats. (Laws of 1907, ch. 214), one who served during a part of the twenty-two years as a volunteer, not devoting his whole time to the service, is entitled to the pension if there is a monthly compensation incident to his service at the time of its termination. *State ex rel. Schaetzle v. Knowles,* 523

16. *It seems* that the "monthly compensation allowed . . . as salary," by which the pension is to be measured, need not be in the form of a stated amount per month, but may be a specified sum per year, payable annually, quarterly, monthly, or otherwise. *Ibid.*

Public improvements: Street improvements: Special assessments.

17. A law for charging, to some extent, the cost of improving that part of the roadway of a street directly in front of parcels of land abutting thereon, lying between the curb line and the center of such roadway, has reference only to the expense incurred within such boundaries. *Northern Pacific R. Co. v. Douglas Co.* 228

18. A law authorizing improvement of a street at the expense in whole or in part of parcels of land abutting thereon or adjacent thereto includes only parcels fronting on that part of the street improved or which adjoin such parcels and are adjacent to the street. *Ibid.*

19. In such a law, nothing appearing clearly to the contrary, "abutting" and "adjacent" are not used synonymously. The former contemplates the street boundary toward the lot as identical with the boundary of the latter toward the former, while the idea of the latter is, a parcel near by the street but separated therefrom by an intervening abutting strip or parcel. *Ibid.*

20. A law providing that, in case of the owner of a parcel of land affected by a street improvement being aggrieved in any way by reason of any determination of the administrative body as to burdening such parcel on account of such improvement, his sole remedy shall be by appeal to the circuit court, is mandatory and exclusive, precluding jurisdiction being exercised in any other way in law or in equity as to any real estate within the calls of the statute. *Ibid.*

21. In the foregoing the words "affected by the improvement" limit the remedy to such parcels of real estate as the administrative board dealing with the matter would have jurisdiction under any circumstances to affect thereby. *Ibid.*

Same: Sewers.

22. Where, with the consent of the city, contracts for the construction of sewers were sublet and the subcontractors fully performed the work thereunder, an assignment of the contracts by the original contractor to the subcontractors was valid and entitled the assignees to maintain an action for extra work done under the contracts, even though the city did not know of or consent to such assignment. *Hanrahan v. Janesville,* 457

23. In dealing with a public corporation a contractor is bound to know the extent of the authority of its officers as well as of the corporation itself. *Ibid.*

24. In bidding upon sewer work in a city governed by the general charter law, contractors are to be guided by the plans and specifications prepared and filed pursuant to sec. 925—214, Stats. (1898), and have no right to rely upon a "bidding sheet" containing computations of the amount of excavation and other work to be done, though prepared and furnished to them by the city engineer; and where such plans and specifications are correct, and especially where the contract in terms provides that the work shall be done in accordance therewith, the contractor cannot recover extra compensation for work required thereby, even though it is in excess of the amount shown by such bidding sheet. *Ibid.*

25. The statute has placed the burden of computing the amount of work in such a case upon the bidders and not upon the city; and the courts are not bound to accept as true the testimony of witnesses to the effect that bidders could not compute the amount of excavation from plans which included profiles carefully drawn to scale, showing the existing surface of the street and the bottom line of the sewer. *Ibid.*

26. Subch. XX of the general charter (secs. 925—208 to 925—239c, Stats. 1898), relating to the construction and maintenance of sewers and the manner of paying therefor, was designed as one system with authority on the part of the city adopting it to take advantage of the different provisions as occasion might require; and the passage of an ordinance providing that the expense be borne by sewer districts does not preclude the city from afterward making the cost of similar improvements payable out of the general fund or by abutting property owners, and it may at will make use of all three methods at the same time. *Holt Lumber Co. v. Oconto,* 500

27. The fact that under said subch. XX a property owner who has been taxed for the construction of sewers under the district system may, by a subsequent change to the city system, be taxed again for building main sewers in other districts, does not render the law invalid as contravening sec. 1, art. VIII, Const., providing that the rule of taxation shall be uniform. *Ibid.*

28. In an action by a taxpayer to set aside certain taxes as a cloud on his title, a complaint alleging that a specific sum was assessed for main sewers, although it further alleges that the report of the board of public works which was adopted included extensions and the rebuilding of branch sewers and the taking up of certain main sewers and relaying the same with larger

and different sewers, there being no positive statement that any sum other than the specific sum named was spread upon the tax roll or became a cloud on plaintiff's title, is *held*, on demurrer, not to show that any tax was levied against plaintiff's land for other purposes than the construction of main sewers or extensions thereof, which alone were chargeable to the general fund. *Ibid.*

29. Allegations in such complaint that an ordinance which provided generally for the construction and maintenance of sewers at the expense of sewer districts was repealed by a later ordinance which provided for the cost of main sewers to be paid out of the general fund, are not to be construed as charging that no authority remained in the city to pay for any except main sewers. *Ibid.*

Use and regulation of streets. See CARRIERS, 5, 6.

Same: Property rights of abutting owners.

30. The owner of a lot abutting on a public street may sell or give away his mere private property right to the use of that part of his premises within the boundaries of the street, including his right to have the way unobstructed; and may bind his successor in title, provided he alienates said property right in such a way as to charge such successor with notice of the incumbrance. *Walterman v. Norwalk*, 663

31. An instrument in writing, duly witnessed and under seal, executed by an abutting owner to the municipality, "on behalf of himself, his heirs, executors, and assigns," releasing all demands, actions, or causes of action which might result from the construction of a building for municipal purposes in the street in front of his premises, is binding upon him and upon his subsequent grantee who bought the land with full knowledge of the situation. *Ibid.*

32. Such an agreement is not contrary to public policy as being a contract not to sue to vindicate the public right in the street. *Ibid.*

33. One who has thus parted with his private property right in the adjoining street cannot thereafter maintain a private action against the municipality for a mandatory injunction to compel the way to be kept open and unobstructed. *Ibid.*

34. An instrument formally executed under seal imports a consideration sufficient to support it. *Ibid.*

35. A *written* license by the owner of land to another, privileging such other to use the licensor's land for some purpose, after being acted upon so that a loss would be inflicted upon the licensee by its withdrawal, is irrevocable. In this state only oral licenses are revocable under such circumstances. *Ibid.*

36. The use of the words "remise, release and forever discharge," in a sealed instrument authorizing the construction of a building for municipal purposes in a public street adjacent to the grantor's premises, indicates an intention to give something more than a mere license, and may fairly be construed as granting an easement in the land. *Ibid.*

37. An action by a private abutter to enforce his private right in the adjacent street, with which he has parted by formal conveyance in writing, does not raise the question of public nuisance or the question of estoppel as against public rights. *Ibid.*

Claims against corporation. See STATES, 4.

NE EXEAT.

1. The circuit court, having jurisdiction to issue a writ of *ne exeat*, has also jurisdiction to deny it. *State ex rel. Cazier v. Turner*, 484

2. The writ of *ne exeat* is a provisional remedy and, an order denying the writ being appealable, the supreme court will not by *mandamus* compel the circuit court to vacate such an order. *Ibid.*

NEGLIGENCE.
Acts and omissions constituting negligence. See ANIMALS, 2. MASTER AND SERVANT, 4–47. RAILROADS, 15–25. SHERIFFS, 4. TELEGRAPHS AND TELEPHONES. TRIAL, 7–10.
Negligence *per se*. See MASTER AND SERVANT, 22.
Proximate cause. See MASTER AND SERVANT, 27, 28, 42. TRIAL, 10.
Contributory negligence. See MASTER AND SERVANT, 8, 18, 19, 23, 37–39, 41, 45–47. RAILROADS, 22, 23.
Comparative negligence. See RAILROADS, 23.

NEGOTIABLE INSTRUMENTS. See BILLS AND NOTES. EVIDENCE, 5.

NEWSPAPERS. See JURY, 4, 5.

NEW TRIAL.

See APPEAL, 5, 6, 11, 12, 20.

A new trial granted without specifying any reason therefor, but upon condition of the payment of the costs of trial, will be presumed to have been granted in the discretion of the court because it was dissatisfied with the verdict. *Herring v. E. I. Du Pont de Nemours P. Co.* 521

NONSUIT. See DISMISSAL AND NONSUIT.

NOTICE.
Of appeal. See APPEAL, 1.
Of danger. See MASTER AND SERVANT, 8.
Of injury. See LIMITATION OF ACTIONS.
Of unrecorded instrument. See CORPORATIONS, 4.

NUISANCES.

1. Sec. 3180, Stats. (1898), relating to actions to recover damages for and to abate private nuisances, is substantially a declaration of the unwritten law, with added features and simplification of procedure. *St. Croix Con. C. Co. v. Musser-Sauntry L., L. & Mfg. Co.* 267

2. In an action to recover damages for injury to lands through the flooding thereof by means of a dam and to abate the nuisance, a complaint alleging plaintiff's present ownership of the lands and that by the operation of the dam during the past three years he has suffered damage, is *held* to allege inferentially his ownership during the period in question and to be sufficient in that particular, though not expressly alleging such ownership. *Ibid.*

OFFICERS. See JURY, 4, 5. MUNICIPAL CORPORATIONS, 15, 16, 23. SHERIFFS.

OLEOMARGARINE. See FOOD, 2.

OPENING JUDGMENT. See JUDGMENT, 4, 11.

OPINION. See FRAUD, 1.

OPTION LAWS. See CONSTITUTIONAL LAW, 1, 2.

ORDINANCES. See MUNICIPAL CORPORATIONS, 3–14, 26, 29.

PAROL EVIDENCE. See EVIDENCE, 3, 4. WATERS AND WATERCOURSES, 1.

PARTIES.

Necessary parties. See BOUNDARIES, 5. RECEIVERS.

Where, after the giving of a deed which, though absolute in form, is claimed to have been merely a mortgage, the grantor conveyed all his interest in the land to a third person, such grantor is not a necessary or proper party to an action by the second grantee to redeem from the alleged mortgage. *Young v. Miner,* 71

Real party in interest. See JUDGMENT, 9.

PARTNERSHIP.

The relation: Proof.

1. If two or more persons engage in a joint business enterprise, each putting in capital or labor or both, with an agreement to share profits as such, that will constitute them partners, whatever they may call themselves. *Bartelt v. Smith,* 31
2. A contract of partnership may be proven by evidence of acts and conduct of the parties from which it may be inferred that they have agreed to become partners and share profits as such. *Ibid.*

Firm property.

3. Whether or not a telephone line is real estate, if it be contributed to the capital of a copartnership it will become firm property so far as paying the firm debts and closing out the partnership is concerned, even though the legal title remain in one partner; and the agreement of copartnership, though not in writing, is not void under the statute of frauds. *Bartelt v. Smith,* 31

Dissolution. See RECEIVERS, 2, 3.

Accounting and settlement.

4. Where partnership affairs have been settled by agreement and nothing remains to be done except payment of the amount which one partner has agreed to pay the other for his share in the business, the remedy at law for failure to pay such agreed sum is adequate and exclusive, at least unless defendant is insolvent. *Schmidt v. Mertes,* 468
5. But where the agreement to dissolve is contingent upon an accounting and settlement which the parties are unable to complete because of divergent views as to their respective interests, and, although defendant has been placed in possession of the firm assets, it appears that such possession was surrendered to him upon his promise that the settlement should be made, and it further appears that there are firm liabilities still unpaid and that defendant has attempted to mortgage the partnership property as his own, an action in equity for an accounting and settlement will lie. *Ibid.*

PASSENGERS. See RAILROADS, 16–20.

PATENT. See TRESPASS, 4–6.

PAYMENT.

Requisites and sufficiency. See EVIDENCE, 5.

Presumption as to payment.

1. The unexplained circumstance of a demand being twenty years past due creates a presumption of payment thereof. *Holway v. Sanborn,* 151
2. The aforesaid rule is according to the common law and subsists notwithstanding the written law. *Ibid.*
3. Unlike the statute of limitations the common-law rule is not a bar nor a legal presumption conclusively extinguishing the debt. *Ibid.*
4. The presumption of payment is one of fact, rebuttable by evidence, direct or indirect, or both, showing to the contrary, the burden of proof being on the creditor. *Ibid.*
5. While the common-law presumption of payment is one of fact it should prevail unless quite satisfactorily overcome by competent evidence. *Ibid.*
6. The evidentiary character of the common-law presumption of payment may be overcome by circumstances alone, in the reasonable judgment of the court, not too remote, sufficient to satisfy a jury, to a reasonable certainty. *Ibid.*
7. For rebuttal of the common-law presumption of payment evidence of absence of the debtor from the state during the whole or a large part of the twenty years, facts preventing the creditor from bringing suit, relationship of the parties, possession of the evidence of indebtedness by the payee, or his personal representative, or in case of death of the former, finding such evidence among the papers left by him apparently unpaid, and many other circumstances according to diverse situations,—are competent. *Ibid.*

Application of payments.

8. Under all ordinary circumstances debtor and creditor may by agreement control the application of payments between themselves. *F. A. Patrick & Co. v. Deschamp,* 224

PENSIONS. See MUNICIPAL CORPORATIONS, 15, 16.

PERSONAL INJURIES. See DAMAGES, 11–13. LIMITATION OF ACTIONS. MASTER AND SERVANT, 4–47. RAILROADS, 15–23. TELEGRAPHS AND TELEPHONES. TRIAL, 7–10.

PHYSICIANS AND SURGEONS. See LIMITATION OF ACTIONS, 3. PLEADING, 4. WITNESSES, 3–5, 8.

PLATS. See BOUNDARIES, 2, 4–6.

PLEADING.

Complaint. See BOUNDARIES, 3–6. MUNICIPAL CORPORATIONS, 28, 29. NUISANCES, 2. PLEADING, 5, 6. STATES, 3.

1. A complaint alleged trespass by defendant upon plaintiff's land in Minnesota, wilful and wrongful cutting of timber thereon, and wrongful conversion of the same. It also alleged value of the timber converted, set up a Minnesota statute giving treble damages for a wilful trespass, and demanded judgment for the actual damages and also for treble damages. *Held* that, regardless of the pleader's intention, a cause of action for conversion

was sufficiently stated, and that the court should have treated as surplusage the allegations respecting a trespass of which it had no jurisdiction. *Bruheim v. Stratton,* 271

2. It was within the power of the court to allow such a complaint to be amended by setting out the conversion more definitely, even if the cause of action were thereby changed from trespass to conversion, *Ibid.*

Answer. See PLEADING, 5.

3. An answer should be held good on demurrer if it states a defense to any cause of action which plaintiff has pleaded and on which he has a right to rely. *Frechette v. Ravn,* 589

4. Thus, in an action against a surgeon for malpractice where the complaint by liberal construction might be held to state a cause of action on contract, but was clearly intended to state a cause of action in tort and contains the necessary averments for that purpose, and plaintiff has made no election of the cause of action upon which he will rely, the defendant may plead the statute of limitations applicable to the action in tort, and the demurrer to such an answer should be overruled. *Ibid.*

Plea in abatement. See CRIMINAL LAW, 1.

Demurrer. See MUNICIPAL CORPORATIONS, 28. PLEADING, 3, 4.

5. If the complaint is bad, a demurrer to the answer may be sustained as a demurrer to the complaint. *State v. Milwaukee,* 131

6. Upon a demurrer to the complaint it is immaterial whether the pleader intended to state a cause of action in equity or one at law, the sole question being whether sufficient facts are stated to entitle plaintiff to some relief against defendant within the competency of the court to grant. *St. Croix Con. C. Co. v. Musser-Sauntry L., L. & Mfg. Co.* 267

Amendment of pleading. See PLEADING, 2.

POLICE POWER. See RAILROADS, 14.

POSSESSION. See ASSIGNMENT FOR BENEFIT OF CREDITORS. BAILMENT. BOUNDARIES, 3. QUIETING TITLE. TRESPASS.

POWER OF ALIENATION. See WILLS, 4.

PRELIMINARY EXAMINATION. See CRIMINAL LAW, 1. PROHIBITION.

PRESUMPTIONS. See ELECTIONS, 3. FRAUD, 5. JUDGMENT, 3. MASTER AND SERVANT, 10. PAYMENT, 1–7. TRIAL, 9.

PRINCIPAL AND AGENT.

The relation: Notes taken by agent as his own property.

Findings of the trial court that certain notes given by the purchasers of machinery were accepted by the agent making the sale as his own property and were so treated by him from the time of their execution, and hence that he did not purchase them from his principal, are *held* to be sustained by the evidence, although the notes were executed upon printed forms naming the principal as payee and were afterwards indorsed by the principal "without recourse." *Stark v. Huber Mfg. Co.* 6

PRIORITIES. See MORTGAGES, 5–14.

PRIVILEGE. See MALICIOUS PROSECUTION.

PROHIBITION.

Even if a defendant accused of criminal libel is entitled to a preliminary examination before he can lawfully be tried (a point not decided), error of the court in refusing such preliminary examination cannot be considered upon a motion for a writ of prohibition. That writ cannot be used to perform the ordinary functions of an appeal or writ of error. *State ex rel. Sullivan v. District Court,* 138

PROMISSORY NOTES. See BILLS AND NOTES. EVIDENCE, 5. JUDGMENT, 8.

PROVISIONAL REMEDIES. See NE EXEAT, 2.

PROXIMATE CAUSE. See FRAUD, 2. MASTER AND SERVANT, 27, 28, 42. TRIAL, 10.

PUBLIC LANDS. See TRESPASS, 4–7.

PUBLIC POLICY. See MUNICIPAL CORPORATIONS, 32.

PUBLIC SCHOOLS. See SCHOOLS AND SCHOOL DISTRICTS.

PUBLIC-SERVICE CORPORATIONS. See CARRIERS. RAILROADS, 1–11.

PUBLIC UTILITIES. See MUNICIPAL CORPORATIONS, 3–14. RAILROADS, 1–11.

PUNISHMENT. See RAPE, 6.

QUIETING TITLE.

See BOUNDARIES, 2–6.

The common-law action *quia timet* may be brought when plaintiff is out of possession and defendant in possession in a case where defendant has apparent title, the invalidity of which can only be shown by evidence *aliunde* the record; and the remedy is not confined to cases of fraud but extends to cases where, in order to give effectual relief, there must be reformation, cancellation, or surrender of deeds, conveyances, or records affecting the title. *Suring v. Rollman,* 490

QUO WARRANTO.

In a *quo warranto* action to test the claim of right to exercise a pretended franchise, the sole question triable is whether the defendant possess the right in fact referable to the grant. *State ex rel. Kenosha G. & E. Co. v. Kenosha E. R. Co.* 337

RAILROAD COMMISSION. See CARRIERS, 6, 7. RAILROADS, 1–11.

RAILROADS.

Railroad commission. See CARRIERS, 6, 7.

1. Ch. 499, Laws of 1907, as amended by ch. 180, Laws of 1909, so far as in conflict with sec. 1780*b*, Stats. (1898), supersedes the same. *State ex rel. Kenosha G. & E. Co. v. Kenosha E. R. Co.* 337

2. Where an indeterminate permit has been acquired under the law of 1907 referred to, as amended, within the scope thereof the municipality is under disability to grant any conflicting franchise privilege, except in case of public necessity and convenience, the fact in that regard to be found as matter of fact and certified by the railroad rate commission prior to making such conflicting grant. *Ibid.*

3. While the legislature cannot empower the railroad rate commission to exercise legislative power, it may clothe it with authority to administer a law requiring, as an incident to the administrative duty, the ascertainment of facts such as is required in passing upon an application for a certificate of convenience and necessity under the public utility law. *Ibid.*

Same: Public utilities.

4. The purpose of the public utility law of 1907 (Laws of 1907, ch. 499), was to ultimately secure uniformity in public utility franchises,—past as well as future grants,—to the end that patrons might obtain service on a plane of equality and at the lowest price practicable—producers and consumers being compelled to deal justly with each other and both deal justly with the public as a whole. *La Crosse v. La Crosse Gas & Electric Co.* 408

5. The indeterminate permit of the public utility law, is a public privilege emanating direct from the state to own, operate, manage, or control any plant or equipment, or any part of a plant or equipment within the state for the production, transmission, delivery, or furnishing of heat, light, water, power, either directly or indirectly to or for the public, and is perpetual and exclusive, subject to the conditions of the public utility law. *Ibid.*

6. The scope of the privilege which springs into existence by operation of law by surrender of a franchise under the act of 1907 is the same as that of the one surrendered, divorced, however, from all the old conditions, and conditioned, only, upon the provisions of such act. *Ibid.*

7. The idea of the act of 1907 was that old franchises, with their peculiar burdens, should be treated as entireties, and that the surrender, in form, of the principal thing should operate as an extinguishment of all incidents inhering therein, and that the thing taken back should be an exact equivalent as to the privilege feature but as to incidents and duration should be referable to the public utility law. *Ibid.*

8. The surrender of a public utility franchise operates as a waiver by the corporation of all executory features of existing contracts regarding service charges regulated by the public utility law. *Ibid.*

9. The feature of the public utility law rendering nonenforceable existing contracts relating to any charge or service regulated thereby, in case of conversion of an old into a new franchise by a surrender of the former, by necessary implication, renders nonenforceable obligations of the corporation incurred as a condition of the old franchise and substitutes therefor the obligations and conditions of such law. *Ibid.*

10. The foregoing covers such special conditions of an old franchise as that of payment to the municipality of compensation as a consideration for the privilege, but not mere business contracts between the corporation and individuals as in case of *Superior v. Douglas Co. Tel. Co.* 141 Wis. 363. *Ibid.*

11. To carry out the legislative idea of our system securing justice between municipalities, public utility corporations, and their patrons, future original franchises were treated in one group, franchises given for old grants in another,—the new creations in either case to be indeterminate permits with uniform char-

acteristics,—with municipal power to deal with the owner in any case or with the owner of an old franchise, referable solely to the public utility law. *Ibid.*

Interurban railways. See CARRIERS, 6.

12. Under sec. 1863, Stats. (Supp. 1906: Laws of 1901, ch. 425), a city may, if it sees fit, refuse to grant to an interurban railway company the right to run its cars over the city streets. Having such power, it may, on granting the right, exact any conditions it sees fit, provided they are not unlawful in themselves, such as an agreement that the rate of fare to a neighboring city shall not exceed a certain sum. *Manitowoc v. Manitowoc & Northern T. Co.* 13

13. Sec. 1862, Stats. (1898), and sec. 1863, Stats. (Supp. 1906: Laws of 1901, ch. 425), are not analogous to sec. 1778, Stats. (1898), under which it has been held that, since telephone and telegraph companies not only receive their franchises directly from the state but are expressly authorized by the state to use the public streets and highways, the authority of local municipalities is restricted to legitimate police regulation. *Ibid.*

14. Where, in the exercise of a power specifically conferred upon it, a city passes an ordinance granting to a street or interurban railway company a franchise, and fixing rates, it acts as the agent of the state, and when, by acceptance, the ordinance becomes a contract the public is concluded by it during its life, and its obligations cannot be impaired by subsequent legislation unless it be held that such ordinance is a part of the charter of the company and subject to amendment or repeal under sec. 1, art. XI, Const. *Ibid.*

Right of way: Condemnation. See APPEAL, 1. EMINENT DOMAIN. WITNESSES, 2.

Operation: Yards: Location of cattle-guard and switch.

15. Where the undisputed testimony of experts is that the location, with reference to each other, of a switch and a cattle-guard in a railroad yard was in accordance with the customary construction of railroads, the jury are not warranted in finding, solely upon their own judgment, that such location was not consistent with ordinary care. *Jensen v. Wis. Cent. R. Co.* 326

Same: Ejection of trespasser from train.

16. From the fact that a servant is intrusted with the charge of a vehicle for certain purposes a jury may infer that he is authorized to exclude therefrom trespassers or persons endeavoring unlawfully to use the vehicle for other purposes. *Daley v. Chicago & N. W. R. Co.* 249

17. Although the authority to eject trespassers from a train be vested in the conductor, yet if by the rules the baggageman has charge of the baggage in a car and it is his duty to report to the conductor the presence of trespassers on said car and, when requested by the conductor, to aid in ejecting them, such baggageman may be found by the jury to have been acting within the scope of his employment in endeavoring to eject a trespasser from the baggage car without calling upon the conductor. *Ibid.*

18. If in such case the baggageman use unnecessary or excessive force his employer is liable. *Ibid.*

19. Authority given to a conductor to eject from his train any passenger who refuses to produce a proper ticket or pass or to pay

fare includes authority to eject a trespasser who makes a like refusal. *Ibid.*

20. One who attempts to ride on a train without ticket, pass, or payment is ordinarily a trespasser. *Ibid.*

Same: Injuries to employees.

21. Sec. 1816, Stats. (Laws of 1907, ch. 254), providing that in every action against a railroad company for injuries sustained by an employee the court shall submit certain questions to the jury, does not require such questions to be submitted in the exact language of the statute, but merely that the matters covered thereby, so far as they are in issue on the pleadings and in controversy on the evidence, shall be specially submitted by appropriate questions. *Jensen v. Wisconsin Central R. Co.* 326

22. Said sec. 1816 does not change the settled practice as to special verdicts, except that in actions governed by it a special verdict is to be taken regardless of any request by counsel, and that, where the situation requires it, the verdict should include a question as to whether contributing fault of the defendant was greater than that of the injured employee. *Ibid.*

23. The questions submitted in such a case should follow approved forms rather than adopt literally the statutory language. Thus the terms "want of ordinary care" and "proximately contributing" should be used rather than the statutory terms "negligence" and "directly contributing;" and as to comparative negligence the question may be simply, "If you find that mutual fault of the defendant and the plaintiff proximately caused the injury, was the fault of the defendant greater?" *Ibid.*

Same: Fires.

24. Whether or not a fire which destroyed plaintiff's sawmill was caused by negligence of the defendant railway company in permitting its right of way to become incumbered with dry grass and other combustible material, which took fire from a passing engine, is *held* upon the evidence to have been a question for the jury. *Allen v. Chicago & N. W. R. Co.* 263

25. Evidence that on previous occasions the engine of a freight train had thrown sparks or coals upon the right of way was not evidence that the engine of such train threw sparks on the day in question, in the absence of any showing that it was the same engine. *Ibid.*

RAPE.

See WITNESSES, 5.

1. Leading questions may, in the discretion of the trial court, be put to the complaining witness in a rape case where she is young and is obliged to testify concerning matters which womanly modesty prompts her to conceal. *Smits v. State,* 601

2. Where, to corroborate her testimony as to her age, the complaining witness in a rape case was asked and stated the date of her confirmation, it was not materially prejudicial to allow her to state in what church she was confirmed. *Ibid.*

3. Whether, in proving that the assaulted female made early complaint, it is admissible to show that she named defendant as the guilty person, is not decided; but no prejudicial error is made to appear by recitals in the record showing only that, during the opening statement of the district attorney as to what he

expected to prove, an objection was made upon some such ground, where it does not appear what the remarks were to which the objection was made, and no evidence of the kind was offered or received. *Ibid.*

4. Where the fact of penetration by the ravisher was conclusively established, it was not error to refuse to instruct the jury that if they found there was no penetration they might find defendant guilty of assault with intent to commit rape. *Ibid.*

5. Sec. 4580, Statz. (1898), as amended by ch. 296, Laws of 1907, relating to fornication with a female under the age of fourteen years, did not have the effect to repeal sec. 4382, Statz. (1898), relating to rape of a female under that age, but both statutes can stand together. *Ibid.*

6. Imprisonment for thirty years for rape upon a female under the age of fourteen years, under sec. 4382, Statz. (1898), is *held* in this case not so disproportionate to the gravity of the crime as to violate the constitutional inhibition against cruel and unusual punishments. *Ibid.*

RATES. See CARRIERS.

RATIFICATION. See MORTGAGES, 6–8.

REAL PARTY IN INTEREST. See JUDGMENT, 9.

REAL PROPERTY. See BOUNDARIES. BROKERS. CORPORATIONS, 3, 4. EASEMENTS. EMINENT DOMAIN. ESTOPPEL, 3. HOMESTEAD. INSTRUCTIONS TO JURY, 9. MINES AND MINERALS. MUNICIPAL CORPORATIONS, 30–37. NUISANCES. PARTNERSHIP, 3. PLEADING, 1. QUIETING TITLE. TRESPASS. WITNESSES, 2.

RECEIVERS.

See APPEAL, 1. REMOVAL OF CAUSES.

Appointment: Party to action.

1. A party to an action will not ordinarily be appointed receiver therein unless both parties consent or there are special circumstances which make such an appointment clearly for the best interests of all concerned, the reason being that the receiver is an officer of the court and should be disinterested. *Bartelt v. Smith,* 31

Compensation: Attorneys' fees.

2. Where a party to an action is appointed receiver therein, the general rule is that he is entitled to no compensation for his services, especially in an action for dissolution of partnership. *Bartelt v. Smith,* 31

3. Where the order appointing one partner receiver of the partnership business and assets recited the other partner's consent thereto, "providing the fees of the receiver could be avoided thereby," such receiver is estopped from claiming compensation; and it makes no difference that the receivership lasted much longer than was expected. *Ibid.*

4. The employment by a receiver of counsel who represented him as a party, while not a practice to be approved, does not necessarily debar such counsel from all compensation, but where his services related to the details of the receiver's duties, such as the sale of the property, drawing and submitting of his report, and other matters as to which there is no conflict but rather a community of interest between the parties, a reasonable bill therefor may be allowed. *Ibid.*

RECORDING OF INSTRUMENTS. See CORPORATIONS, 4.

REDEMPTION. See PARTIES.

REFORMATION OF INSTRUMENTS. See MINES AND MINERALS, 7. MORTGAGES, 15. QUIETING TITLE.

REGULATION. See CARRIERS.

REMOVAL OF CAUSES.

Where, pending a proceeding in a state court to condemn land for a railroad company, the company is placed in hands of receivers in an action in a federal court and such receivers, on their own application, are made parties to the condemnation action, they take that action as they find it, subject to the disabilities of the railroad company, and the case does not become one of federal cognizance so as to entitle them to have it removed to the federal court. *Jeffery v. Osborne,* 351

RENTS. See MINES AND MINERALS.

REPLEVIN.

See WITNESSES, 7.

In an action of replevin for timber, the holding of the trial court is sustained, to the effect that there was no evidence of consent by defendant to the cutting of timber from its land or of facts which would estop defendant from claiming that no consent was given. *Duluth Log Co. v. St. Croix Land Co.* 286

REQUESTS FOR INSTRUCTIONS. See CRIMINAL LAW, 5. INSTRUCTIONS TO JURY, 3, 4.

RESCISSION. See SALES, 3, 4.

REVOCATION. See GUARANTY, 2. MUNICIPAL CORPORATIONS, 35.

SALES.

Conditional sales. See ASSIGNMENT FOR BENEFIT OF CREDITORS.

Construction of contract.

1. Plaintiff, after examination, bought from defendants certain machinery and also a mass of raw material the exact amount of which could not be determined by inspection. The bill of sale specified the quantities, including "620 cords of 13-inch pail staves at $3 per cord, valued and sold at $1,860," and "1,200 cords of 26-inch bolts, which is equal to 2,400 cords of 13-inch staves, valued and sold at $3 per cord, $7,200." *Held,* that the quantities so specified were binding on the defendants and could not be treated as mere estimates. *Menasha Wooden Ware Co. v. Mitchelstetter,* 486

2. There being conflicting evidence as to whether or not the 1,200 cords of 26-inch bolts in fact made 2,400 cords of 13-inch staves, a construction of the contract by the trial court as requiring defendants only to deliver the 1,200 cords of bolts and not as warranting the number of staves that would be produced therefrom, was as favorable to defendants as the terms of the contract will permit. *Ibid.*

Rescission of contract.

3. Under the facts, stated in the opinion, it is *held* that there was a rescission and that the vendee was not liable for the purchase price. *Wilson v. Solberg,* 573

4. In an action for the purchase price of goods, where defendant claimed that the sale had been rescinded for breach of warranty, a restriction as to the time in which claims must be made, printed upon the bill sent with the goods, bearing a date later than the contract of sale, and not shown to have been any part thereof, was not binding upon defendant or admissible in evidence. *Ibid.*

Performance of contract: Delivery and acceptance of goods.

5. One who actually bought and received merchandise is liable to pay for the same although at her request the account was kept and the goods invoiced in a different name in order to avoid trouble with a third person with whom she had agreed not to compete in business. *F. A. Patrick & Co. v. Deschamp,* 224

Operation and effect: Transfer of title between parties.

6. Under a contract for the growing of beets and delivery thereof to a sugar factory, providing that all beets testing under a certain per cent. of sugar would not be received or paid for, title to the beets did not pass until after they were tested. *Kuehn v. Nero,* 256

Warranties: Breach. See SALES, 3, 4.

7. Where an automatic grain scale was sold under a guaranty that it would weigh accurately within one eighth of one per cent., evidence of numerous tests showing discrepancies averaging slightly greater than said percentage, but so uniform as to indicate lack of adjustment rather than inaccuracy, is *held,* especially in view of the conditions surrounding the tests, not to show a failure to fulfil the contract requirement. *Listman Mill Co. v. Avery Scale Co.* 77

SCHOOLS AND SCHOOL DISTRICTS.

See INTOXICATING LIQUORS.

Free high school districts: Dissolution.

Sec. 490*a*, Stats. (Laws of 1907, ch. 588), relating to dissolution of free high school districts, applies to high school districts formed under sec. 490 (Laws of 1909, ch. 217), but not to joint free high school districts formed under sec. 491 (Supp. 1906). *State ex rel. Greeley v. Joint Free High School District,* 608

SEALS. See MUNICIPAL CORPORATIONS, 34, 36.

SETTLEMENT. See PARTNERSHIP, 4, 5.

SEWERS. See MUNICIPAL CORPORATIONS, 22–29.

SHERIFFS.

1. A sheriff who has property in his custody, pursuant to a levy thereon, is liable for its loss whenever caused by his failure to exercise reasonable care and diligence to preserve such custody or, in case of a loss of possession through any cause, to repossess himself thereof as provided by subd. 3, sec. 2749, Stats. (1898). *Phillips v. Eggert,* 43

2. Whenever a sheriff sets up a justification for the release or loss of property taken on attachment, the burden is on him of showing that he had been relieved from the obligation of having the property forthcoming to answer the judgment. *Ibid.*

3. Consent of plaintiff's attorney that the sheriff need not employ a custodian to take charge of a steamboat which he has attached,

while lying at a wharf in the harbor, does not relieve him from the duty to do everything that reasonable care and diligence demand to repossess himself of the boat after it has cleared and passed out of his possession to other parts. *Ibid.*

4. A sheriff who, after learning of the disappearance of a steamboat which he had attached, made no effort to ascertain its whereabouts or to recover it, although promptly notified by plaintiff's attorney that he would be held responsible for any judgment that might be recovered in the action, was guilty of negligence in that regard for which he and his bondsmen were answerable; and the fact that such steamboat cleared for a port in another state would not relieve them. *Ibid.*

5. A sheriff has a special interest in property attached by him, which authorizes him to retake it or recover it in legal proceedings, even in a foreign jurisdiction, for the purpose of satisfying the demand of the attaching creditor. *Ibid.*

SPECIAL VERDICT. See MASTER AND SERVANT, 40, 41. RAILROADS, 21–23. TRIAL, 7–14.

STATES.

See CARRIERS.

1. Words of a statute applying to private rights do not affect those of the state. The general business of the legislative power is to establish laws for individuals, not for the sovereign; and when the rights of the state are to be transferred or affected the intention must be plainly expressed or necessarily implied. *State v. Milwaukee,* 131

2. The state may maintain an action directly against a county or a city charged with detaining moneys belonging to the state, and is not obliged to pursue its remedy in the manner prescribed by secs. 676–678, 682, 683, Stats. (1898), or by provisions of the city charter, all of which relate to the collection of private claims. *Ibid.*

3. In an action by the state against a county and a city, allegations of the complaint that defendants have received to the use of the state and unlawfully detain a certain sum, being the clear proceeds of fines collected, which said sum defendants were legally bound and promised to pay to plaintiff without demand according to the provisions of the constitution and statutes of the state, mean merely that the treasurers of the defendants received such fines and failed to pay them over to the state as required by the constitution and laws. *Ibid.*

4. The county and city are not liable for such default of their treasurers, and can be held liable for the money sued for only upon a showing that they actually received it and used it for legitimate municipal purposes. *Ibid.*

STATUTE OF FRAUDS. See BILLS AND NOTES, 1. PARTNERSHIP, 3.

STATUTE OF LIMITATIONS. See EVIDENCE, 5. LIMITATION OF ACTIONS. PAYMENT, 3–7. PLEADING, 4.

STATUTES.

Amendment and repeal. See MORTGAGES, 15. MUNICIPAL CORPORATIONS, 11, 29. RAILROADS, 1, 2, 14. RAPE, 5.

Mandatory or directory? See MUNICIPAL CORPORATIONS, 20.

Constitutionality. See CONSTITUTIONAL LAW.

Construction. See ASSIGNMENT FOR BENEFIT OF CREDITORS. BAILMENT, 2, 3. BILLS AND NOTES, 1. BOUNDARIES, 2–4. BRIDGES. CARRIERS, 2, 4–6. CHATTEL MORTGAGES. CONSTITUTIONAL LAW, 3, 4. CORPORATIONS, 1, 3, 4. CRIMINAL LAW, 1, 8. FOOD, 1. GARNISHMENT, 2. HOMESTEAD. INSTRUCTIONS TO JURY, 7. INTOXICATING LIQUORS, 1. JUDGMENT, 7, 11. LIMITATION OF ACTIONS, 1, 2. MASTER AND SERVANT, 18–26, 31. MORTGAGES, 15. MUNICIPAL CORPORATIONS, 2, 5, 9–11, 15, 16, 24–27. NUISANCES, 1. RAILROADS, 1, 2, 4, 7, 12, 13, 21. RAPE, 5. SCHOOLS AND SCHOOL DISTRICTS. SHERIFFS, 1. STATES, 2. TRESPASS, 3. WITNESSES, 3, 8, 9.

STREETS. See CARRIERS, 5, 6. MUNICIPAL CORPORATIONS, 17–21, 30–37.

SUBCONTRACTORS. See MUNICIPAL CORPORATIONS, 22.

SURPLUSAGE. See PLEADING, 1.

SURVEYS. See BOUNDARIES.

SUSPENSION OF POWER OF ALIENATION. See WILLS, 2.

TAXATION. See BRIDGES. MUNICIPAL CORPORATIONS, 5–14, 27–29.

TAXPAYER'S ACTION. See MUNICIPAL CORPORATIONS, 28, 29.

TELEGRAPHS AND TELEPHONES.

See PARTNERSHIP, 3.

In an action for injuries to a traveler on a highway, caused by a telephone wire hanging loosely across the highway within a few feet of the ground, a finding by the jury that such position of the wire was due to negligence on the part of defendant is *held* to be sustained by the evidence. *Herlitzke v. La Crosse Inter-Urban Telephone Co.* 185

TRESPASS.

See ANIMALS. DAMAGES, 4, 5. PLEADING, 1, 2. RAILROADS, 16–20.

1. Where the plaintiff in an action for trespass upon land was not in actual possession but relies on constructive possession, he must establish such possession by showing that he had good title. *Knapp v. Alexander-Edgar Lumber Co.* 528
2. A trespasser on unoccupied land can be made to respond in damages but once, and then to the owner. *Ibid.*
3. Sec. 4269, Stats. (1898), does not give more than one right of action for a single injury to the freehold. *Ibid.*
4. An entryman under the homestead law acquires no title to the land until he has complied with the law and has earned his patent. *Ibid.*
5. If, before the homesteader has taken possession and while his right to the land is still inchoate, a trespass is committed thereon, the sole right of action is in the United States as owner. *Ibid.*
6. Such right of action is extinguished by a settlement made by the trespasser with the United States, and is not revived by subsequent issuance of the patent to the homesteader. *Ibid.*
7. The equitable doctrine of relation cannot be applied to such a case for the purpose of compelling the trespasser to pay twice for the same wrong. If it has any application, it operates merely to charge the government as trustee of the patentee for the amount collected for the trespass. *Ibid.*

TRIAL.

Course and conduct of trial. See JURY.

Reception of evidence. See APPEAL, 5, 18. DAMAGES, 2, 3, 5. JUDGMENT, 13, 14. RAPE, 1–4. SALES, 4. WATERS AND WATERCOURSES, 1. WITNESSES.

Same: Objections and motions to strike out.

1. The refusal of the trial court, on motion, to strike out the evidence of a witness on the ground that, in stating the value of a strip taken by a railroad company, he had included damages to the entire tract from which it was taken and had thus duplicated damages, was not a prejudicial error where the verdict was amply supported by the evidence of seven disinterested experts. *Jeffery v. Osborne,* 351

Taking case or question from jury. See GUARANTY, 1, 2. MASTER AND SERVANT, 2, 16, 34, 38. RAILROADS, 24. TRIAL, 2–6.

Instructions to jury. See BAILMENT, 2. INSTRUCTIONS TO JURY. MASTER AND SERVANT, 41. RAPE, 4.

Same: Requests for instructions. See CRIMINAL LAW, 5. INSTRUCTIONS TO JURY, 3, 4. TRIAL, 8.

Direction of verdict. See APPEAL, 6, 15.

2. In determining whether a verdict should be directed for one party the evidence of the other must be assumed to be true. *F. A. Patrick & Co. v. Deschamp,* 224
3. Upon a motion to direct a verdict the trial court must determine as a question of fact whether the evidence in any reasonable view would warrant any other conclusion, and if satisfied that it would not should direct the verdict. *Kroger v. Cumberland Fruit Package Co.* 433
4. In directing a verdict under such circumstances there is no invasion of the province of the jury. *Ibid.*
5. The trial court's decision of the question of fact arising upon a motion to direct a verdict should not be disturbed on appeal unless clearly wrong. *Ibid.*
6. A difference of opinion among the justices of the appellate court upon the question of fact involved does not preclude a holding that the trial court was right in directing a verdict. *Ibid.*

Special verdict. See MASTER AND SERVANT, 40, 41. RAILROADS, 21–23.

7. Where there is a controversy as to whether or not the act or omission charged as negligence of the defendant did in fact occur, the jury should be required, if a special verdict is taken, to determine separately whether such act or omission occurred, and, if it did, whether it occurred in consequence of a lack of ordinary care on the part of defendant. *Fidelity Trust Co. v. Wisconsin I. & W. Works,* 385
8. But defendant cannot, in such a case, complain that the only question submitted was whether in such act or omission he was guilty of a want of ordinary care, where he did not request the submission of any other or broader question covering the issue omitted, but in fact proposed a still narrower finding. *Ibid.*
9. All controverted matters of fact not covered by the special verdict and not brought to the attention of the trial court by the party against whom the judgment goes, are presumed to have been determined by the court in conformity with the judgment. *Ibid.*

10. Where in answer to proper questions the jury found negligence of defendant and that it was the proximate cause of plaintiff's injuries, refusal to submit the question whether such injuries were the result of "mere accident" was not error, though in some cases such a question would be proper. *Schmolt v. H. W. Wright Lumber Co.* 577

11. Each question in a special verdict should be so framed that the issue will be determined by any responsive answer thereto. *Carle v. Nelson,* 593

12. Thus, the issue being as to market value, a question asking in effect, Did the vendor use reasonable efforts to sell the tobacco at the highest price obtainable in the vicinity after it was rejected by the vendee? was objectionable because if answered in the negative the issue would not be determined. But the answer in this case being in the affirmative, the error was harmless. *Ibid.*

13. The issue made by the complaint and answer and the issue made by a counterclaim and reply are distinct issues in different causes of action and should never be embodied in the same question in a special verdict, even though they apparently relate to the same subject matter. *Ibid.*

14. As to each question properly submitted for special verdict the burden of proof is either upon the plaintiff or upon the defendant. It cannot rest partly upon each. *Ibid.*

Trial by court: Findings. See APPEAL, 9–14. MORTGAGES, 3, 4.

TRUSTS AND TRUSTEES.

1. Where a trust agreement providing for a conveyance of property for the payment of debts of the grantors, but containing no express provision for the return to them of any surplus, left it doubtful what the intent of the grantors was in that regard, it was proper to receive and consider extrinsic evidence as to the facts and circumstances surrounding the parties at the time of its execution in order to arrive at its proper construction. *McMillan v. Holley,* 617

2. *Held,* upon extrinsic proof showing that no surplus was anticipated by at least one of the debtors at the time of making the agreement, and that both had considered the subject of providing in the agreement for the disposal of any surplus but omitted it from the final draft, that the trial court properly found the conveyance to be absolute for the benefit of the creditors alone, and that there was no trust for the grantors. *Ibid.*

3. In such case the trustees having, for lack of purchasers, conveyed the residuum of the property to a corporation organized by the creditors for the purpose of taking title thereto, neither the trustees nor such corporation was under obligation to account to the debtors in respect to the property so conveyed, although by the return of better times and the general improvement of business it increased largely in value. *Ibid.*

UNDERTAKINGS. See APPEAL, 1, 7. INJUNCTION.

VACATING JUDGMENT. See JUDGMENT, 4, 11.

VALUE. See DAMAGES, 1–9. WITNESSES, 2.

VERDICT. See APPEAL, 6, 14, 15. MASTER AND SERVANT, 40, 41. RAILROADS, 21–23. TRIAL, 7–14.

VESSELS. See SHERIFFS, 3, 4.

VICE-PRINCIPAL. See MASTER AND SERVANT, 42.

VOTES. See ELECTIONS.

WAIVER. See CRIMINAL LAW, 6, 7. INTEREST. MINES AND MINERALS, 6, 7. RAILROADS, 8.

WARRANT OF ATTORNEY. See JUDGMENT, 1–11.

WARRANTY. See SALES, 3, 4, 7.

WATERS AND WATERCOURSES.

See EVIDENCE, 7. NUISANCES, 2.

Dams.

1. To aid in the interpretation of a deed granting certain rights relative to a mill-dam, pond, and the use of power, oral evidence of extrinsic facts and circumstances existing at the date of the grant, including the location, size, and description of the dam, mills, waste-gates, etc., was admissible. *Colt v. Paulson,* 214
2. In an action for an injunction compelling removal of a cofferdam built by defendant in a mill-pond and restoration of a waste-gate closed by him, and restraining the doing of such acts in the future, it was not error, upon granting such relief, to refuse to find and adjudge defendant's rights in other particulars with respect to the water power, when such adjudication was not necessary. *Ibid.*

WILLS.

Probate. See APPEAL, 4.

Construction.

1. A testator seventy-five years of age, in failing health, who by his original will had given all his property to his wife, twelve years his junior, executed a codicil in which he devised to each of his four living children specific tracts of land, all "to be subject to the use, occupation, and control of my wife . . . during the term of her natural life. In case of the death of any of my said children without issue remaining alive, the land . . . devised to him or her is to go to his or her brothers or sisters equally and in equal shares, but in case of them having children then living the same shall go to and belong to such children of such devisees respectively in equal shares." *Held,* that the "death of any of my said children," referred to, did not mean death during the lifetime of the testator or of his widow, but death at any time; and that the estate devised to each of the testator's children terminated at his or her death, with remainder over to his or her children then living, if any, and if none then to his or her brothers and sisters. *Eggleston v. Swartz,* 106
2. Such devises did not suspend the power of alienation for more than two lives in being, since under no possible contingency could there be a suspension of the power to convey any tract in fee longer than during the life of the widow and the life of a child of the testator. *Ibid.*
3. Since the estate of testator's children terminated at death, a mortgage executed by one of them in his lifetime was subject to the same limitation, and upon the death of such mortgagor the land passed to his children then living, free from any claim of the mortgagee. *Ibid.*

Rights and liabilities of devisees. See WILLS, 1, 2.

WITNESSES.

Competency.

1. The question of the competency of a witness to testify is a matter largely in the discretion of the trial court, and its ruling thereon will not be disturbed if there was no abuse of discretion. *Carle v. Nelson,* 593

Same: Experts. See DAMAGES, 8. MASTER AND SERVANT, 30.

2. Experts in the manufacturing business, acquainted from long years of experience with the values and needs of plants of that kind, are competent to testify to the value, as part of a manufacturing plant to which it belonged, of a strip of land taken for the right of way of a railroad company, though having no knowledge at all as to the value of bare land in the vicinity, especially where there is practically no dispute on the question of the value of the strip as mere land. *Jeffery v. Osborne,* 351

3. Under sec. 1436, Stats. (Supp. 1906: Laws of 1903, ch. 426, sec. 8), a physician who qualifies as an expert under general common-law rules may be allowed to testify as such in a criminal case, even though his license has not been recorded as required by sec. 1435*e* (Supp. 1906: Laws of 1903, ch. 426, sec. 5). *Smits v. State,* 601

4. Testimony of a witness that he is a practicing physician duly licensed to practice in this state must be held to mean, *prima facie,* that he has fully complied with the license law. *Ibid.*

5. Where a physician called as a witness in a rape case testified that he had been an active practitioner for a number of years, it will be inferred that he was qualified by practical experience to testify as an expert, in the absence of any cross-examination as to such qualification. *Ibid.*

Same: Husband and wife.

6. Husband or wife may be a witness in behalf of a codefendant of the other spouse when such defendant spouse has only a representative or nominal interest in the action, even though said defendant spouse may be liable for costs in case of defeat. *Robinson v. McGinnis,* 476

7. The custodian of personal property who is made defendant in replevin with his principal, the owner of such property, is to be considered as having only a nominal interest in the action, within the meaning of the foregoing rule. *Ibid.*

Same: Physicians: Privilege.

8. If sec. 4075, Stats. (1898), providing that no physician shall be compelled to disclose information acquired in attending a patient professionally which was necessary to enable him to prescribe for the patient, applies to criminal cases,—a point not decided,—the conditions mentioned must affirmatively appear in order to call for its application. *Smits v. State,* 601

Same: Transactions and communications with persons subsequently deceased.

9. Under sec. 4069, Stats. (1898), excluding testimony of a party as to any conversation or transaction had by him with a deceased person under whom he claims, the testimony of a third person, present and constructively participating in the conversation or transaction by in any way exerting an influence in respect thereto, is also excluded. *Holway v. Sanborn,* 151

Same: Mental infirmity.

10. A person is not necessarily incompetent to testify because of impaired mental condition at the time of the occurrences in question. Whether he is so mentally infirm as not to be entitled to testify at all is a question for the trial court, and its decision in favor of receiving the testimony for what it is worth cannot be disturbed unless manifestly wrong, as where the infirmity is total or such as to render the person wholly unconscious of the obligations of an oath. *Burns v. State,* 373

Examination.

11. Refusal of the trial court to permit a witness for defendant to testify on rebuttal on the question of the delivery of the instrument in suit, is *held* in this case not an abuse of discretion. *First Nat. Bank v. Wunderlich,* 193

Credibility.

12. False testimony given by a witness as to a material fact must have been wilfully false in order to justify rejection of his other testimony not corroborated by credible evidence. *Allen v. Chicago & N. W. R. Co.* 263

WORDS AND PHRASES.

Abutting, in statute. See MUNICIPAL CORPORATIONS, 19.
Adjacent, in statute. See MUNICIPAL CORPORATIONS, 19.
Affected by the improvement, in statute. See MUNICIPAL CORPORATIONS, 21.
All belting, shafting and gearing, in statute. See MASTER AND SERVANT, 31.
Death of any of my said children, in will. See WILLS, 1.
Found, in statute. See JUDGMENT, 10.
Furnishes, in statute. See FOOD, 1.
In the hands, in statute. See GARNISHMENT, 2.
Market value. See DAMAGES, 1, 7.
Monthly compensation allowed as salary, in statute. See MUNICIPAL CORPORATIONS, 16.
Person aggrieved, in statute. See APPEAL, 4.
Provisional remedy. See NE EXEAT, 2.
School, in statute. See INTOXICATING LIQUORS, 1, 2.

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